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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

LIEUTENANT JAMES L. GRACE, et al.,

Petitioners

v.

HARVEY TABRON,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, contrary to the decision of the Court of Appeals, an "exceptional circumstances" standard should govern the decision to appoint counsel for an indigent plaintiff under 28 U.S.C. §1915, thereby recognizing the full breadth of the district court's discretion?

LIST OF PARTIES

Petitioners are employees of the Pennsylvania Department of Corrections: James L. Grace, James S. Price, Francis R. Maskulyak, Mary K. (Gross) Perkins, Andrew Domovich, Raymond J. Sobina, Thomas A. Fulcomer and Melvin P. Cooper.

Respondent is Harvey Tabron.

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OPINIONS BELOW

The opinion of the panel of the Court of Appeals is reported at 6 F.3d 146 (3d Cir. 1993), and a copy may be found in the appendix at 10a. The order of the Court of Appeals denying rehearing is not reported, but is reproduced in the appendix at 1a. The decisions of the District Court (Pet. App. 64a, 66a, 72a, 115a) are not reported.

STATEMENT OF JURISDICTION

The opinion of the panel of the Court of Appeals was issued on October 5, 1993, and petitioners timely petitioned for rehearing under Fed.R.App.P. 40. The Court of Appeals issued its order denying rehearing on October 29, 1993, and this petition for writ of certiorari has been filed within ninety days of the denial of rehearing. Jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTE INVOLVED

Section 1915 of Title 28, United States Code, provides as follows:

> (a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor . . . .
>
> (d) The court may request an attorney to represent any such person unable to employ counsel . . . .

28 U.S.C. § 1915(a), (d).

STATEMENT OF THE CASE

This is a prisoner civil rights action which the respondent, Harvey Tabron, an inmate incarcerated at the State Correctional Institution at Huntingdon, Pennsylvania, brought against the petitioners, various corrections officials at the institution. Tabron sought compensatory and punitive damages, pursuant to 42 U.S.C. §1983, for alleged violations of his constitutional rights at the prison. After the pro se complaint was filed, Tabron moved for appointment of counsel under 28 U.S.C. §1915(d), which a magistrate judge of the United States District Court for the Middle District of Pennsylvania denied on the ground that there were no "exceptional circumstances" warranting such an appointment. Pet. App. 115a, citing Cook v. Bounds, 518 F.2d 779 (4th Cir. 1975).

Proceeding pro se, Tabron conducted and defended discovery. (Pet. App. 72a, 75a-76a, 81a). On September 20, 1991, the magistrate judge issued a report recommending that summary judgment be granted in favor of the corrections officials. (Pet. App. 72a). The report also recommended that Tabron's motions to compel discovery and motion for free deposition transcripts be denied. (Pet. App. 113a-114a).

Tabron filed objections to the magistrate judge's report, and by memorandum and order dated December 2, 1991, the District Court adopted in part, rejected in part, and deferred in part the magistrate judge's recommendation. (Pet. App. 66a). The court adopted the report on the discovery questions, with the exception of whether the prison officials were required to answer certain

interrogatories to which the court directed an in camera submission, and deferred a decision on the motion for summary judgment. (Pet. App. 70a-71a). Following the in camera submission, the court released the documents to Tabron and granted the officials' motion for summary judgment. (Pet. App. 64a).

Still proceeding pro se, Tabron appealed to the Court of Appeals for the Third Circuit. The Court of Appeals appointed counsel for Tabron, and on October 5, 1993 vacated the judgment of the District Court and remanded for further proceedings. (Pet. App. 10a, 62a). The Court of Appeals determined that the magistrate judge improperly had denied Tabron's request for appointment of counsel under 28 U.S.C. § 1915(d) and remanded the case to the District Court for reconsideration of the counsel

request.[1] (Pet. App. 12a, 62a).

In vacating the judgment of the District Court, the Court of Appeals declined to follow the majority of the Courts of Appeals, which have held that counsel should be appointed under Section 1915(d) only in "exceptional circumstances." (Pet. App. 36a-39a). Instead, while recognizing that there is no statutory right to appointed counsel in a civil case and that Section 1915(d)

---

[1] The Court thus did not reach other points of error raised by Tabron with the exception of the question of free deposition transcripts. On this point, the Court agreed with the District Court that it had no authority to provide an in forma pauperis litigant with copies of deposition transcripts at government expense; however, the Court did advise that a district court may order an opposing party to pay for an indigent prisoner's deposition transcripts but concluded that the District Court did not abuse its discretion in refusing to require the prison officials to pay for Tabron's deposition transcripts in this case. (Pet. App. 55a-62a).

gives district courts "broad discretion" to request an attorney to represent an indigent litigant (Pet. App. 29a-30a), the Court imposed a ten-prong standard that must be considered by trial courts on requests for counsel. This standard requires a district court to consider the following:

1) whether the claim has "arguable merit in fact and law;"

2) the plaintiff's ability to present the case;

3) if the plaintiff is a prisoner, the "restraints placed upon him or her by confinement;"

4) the difficulty of the issues;

5) the "degree to which factual investigation" is required;

6) the "extent to which prisoners and others suffering confinement may face problems" in pursuing their claims;

7) the degree to which the plaintiff must comply with "complex discovery rules;"

8) whether the case is likely to turn on credibility determinations;"

9) whether the case requires expert testimony; and

10) the "practical restraints" on the district courts' ability to locate willing and competent attorneys to accept appointments.

(Pet. App. 40a-50a).

The corrections officials filed a petition for rehearing (Pet. App. 3a), in which they argued that the Court of Appeals' decision was inconsistent with its own earlier decision in Smith-Bey v. Petsock, 741 F.2d 22, 26 (3d Cir. 1984), and that in any event the importance of the question warranted rehearing. (Pet. App. 7a-8a). The Court of Appeals denied rehearing. (Pet. App. 1a).

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' DECISION ON THE STANDARD TO BE APPLIED TO REQUESTS FOR APPOINTMENT OF COUNSEL UNDER 28 U.S.C. § 1915(d) CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS.

The question of the proper standard for the appointment of counsel in civil cases has provoked widespread disagreement among the Courts of Appeals. As the Third Circuit recognized, Pet. App. 36a-39a, its decision in this case directly conflicts with the majority view in the Courts of Appeals; indeed, the Third Circuit's decision in this case cannot even be reconciled with its own earlier decision in Smith-Bey v. Petsock, 741 F.2d 22, 26 (3d Cir. 1984). Other Courts of Appeals have taken still other approaches to this question. This disarray among the Courts of Appeals on an important federal question requires the guidance of the

Court.

The basis for the Court of Appeals' decision to vacate the judgment of the District Court was its determination that the District Court had applied the incorrect standard to Tabron's request for appointment of counsel under 28 U.S.C. § 1915(d). In so doing, the Court of Appeals recognized that there is no statutory right to appointed counsel in a civil case and that Section 1915(d) "gives district courts broad discretion to request an attorney to represent an indigent civil litigant." (Pet. App. 29a-30a). Furthermore, the Court expressly recognized that the determination to appoint counsel "must be made on a case-by-case basis." (Pet. App. 51a).

Notwithstanding this recognition, the Court of Appeals imposed a multi-faceted analysis that a District Court must

consider when presented with a request for appointment of counsel. (Pet. App. 40a-50a). This approach conflicts with decisions of other Circuits where the "exceptional circumstances" test has been adopted. See, e.g., Lavado v. Keohane, 992 F.2d 601, 605 (6th Cir. 1993); Santana v. Chandler, 961 F.2d 514, 515 (5th Cir. 1992); Fowler v. Jones, 899 F.2d 1088, 1096 (11th Cir. 1990); Cookish v. Cunningham, 787 F.2d 1, 2 (1st Cir. 1986); Aldabe v. Aldabe, 616 F.2d 1089, 1093 (9th Cir. 1980); Cook v. Bounds, 518 F.2d 779, 780 (4th Cir. 1975). It was this exceptional circumstances standard that was relied upon by the District Court to deny the request for appointment of counsel in this case. (Pet. App. 115a).

The exceptional circumstances standard recognizes the breadth of the trial court's discretion in these matters

and fully allows for review on a case-by-case basis. And, as the courts that have adopted the exceptional circumstances standard recognize, the standard is stringent because appointed counsel is a privilege, one that is reserved for cases requiring a trained practitioner so as to avoid fundamental unfairness. See, e.g., Lavado, 992 F.2d at 605; Santana, 961 F.2d at 515-16; Cookish, 787 F.2d at 2.

The Court of Appeals here expressly declined to follow the weight of authority from other Circuits and instead charted its own course. The Courts of Appeals for the Second and Seventh Circuits also have rejected the exceptional circumstances standard in favor of a more general or, in their words, "middle ground" approach, but it is not the same as that adopted by the Third Circuit. See Hodge v. Police Officers, 802 F.2d 56, 60-61 (2d Cir.

1986); Maclin v. Freake, 650 F.2d 885 (7th Cir. 1981)(per curiam). Finally, the Court of Appeals for the Eighth Circuit appears to have its own standard that requires appointment if a "colorable" claim is presented. Hahn v. McLey, 737 F.2d 771, 774 (8th Cir. 1984)(per curiam).

Thus, in the absence of guidance from this Court, the Courts of Appeals have adopted widely varying approaches to the appropriate interpretation of 28 U.S.C. §1915(d). Given the great numbers of cases in the district courts that the appointment of counsel standard can affect (Pet. App. 47a n.6), the Court should grant this petition to resolve the conflict in the Circuits and harmonize the standard to be applied under 28 U.S.C. § 1915(d).

II. THE QUESTION OF THE APPROPRIATE STANDARD TO BE APPLIED TO REQUESTS FOR APPOINTMENT OF COUNSEL IS AN IMPORTANT ONE THAT HAS NOT BEEN ADDRESSED BY THE COURT BUT WHICH CAN AFFECT THOUSANDS OF CASES ANNUALLY.

By the Court of Appeals' own calculation, there are thousands of civil rights cases filed each year under 42 U.S.C. § 1983 by prisoners alone. (Pet. App. 47a n.6). These statistics of course do not account for the non-prisoner plaintiffs in Section 1983 actions who also may request appointed counsel. By definition, these §1983 actions are targeted against state and local governments and officials, who must devote increasingly scarce resources to defending them. If district courts are required to apply a multi-faceted analysis to thousands of cases annually, judicial resources likewise are impacted significantly. By all accounts,

therefore, the question of the appropriate standard to be applied to requests for counsel under 28 U.S.C. § 1915(d) is an important one to both litigants and district courts.

That this Court has not addressed specifically the question of the appropriate standard to be applied to such requests increases the importance of the question. While the Court has held that a district court is without authority to compel an attorney to represent an indigent litigant under 28 U.S.C. § 1915(d), Mallard v. United States District Court for the Southern District of Iowa, 490 U.S. 296, 310 (1989), the Court has not had the occasion to address the standard a district court should use when evaluating a request. In view of the importance of the question to litigants and district courts alike, the Court

should take the opportunity to address the question and provide needed direction to the Courts of Appeals.

CONCLUSION

For these reasons, the Court should grant this petition for writ of certiorari and, upon review, reverse the judgment of the Court of Appeals for the Third Circuit.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 92-7018

HARVEY TABRON,

Appellant

v.

LT. GRACE; (Lieutenant) MAJOR PRICE; CORRECT OFFICER GROSS,CORRECTIONS OFFICER), (Corrections Officer), a/k/a Perkins; SGT. MASKULYAK; R. SOBRINA, Deputy Warden for Treatment; A. DOMOVICH; (Deputy Warden Operations); THOMAS FULCOMER; and M. P. COOPER

(D.C. Civil No. 89-0633)

Present: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, Circuit Judges and WEIS, Senior Circuit Judge[1]

SUR PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING IN BANC

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[1]As to panel rehearing only.

The petition for rehearing filed by Appellees, having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is DENIED.

BY THE COURT:

_____
Becker, Circuit J.

DATED: Oct. 29, 1993

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

HARVEY TABRON,	:	
	:	
Appellant	:	
	:	
v.	:	No. 92-7018
	:	
LT. JAMES GRACE, ET AL.,	:	(D.C. Civ. No. 3:CV-89-0633)
	:	
Appellees	:	

PETITION FOR REHEARING BEFORE THE PANEL AND FOR REHEARING IN BANC

Pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure, appellees, by their attorneys, move for rehearing of the above-captioned appeal before the panel of the Court and for rehearing before the Court in banc. In support hereof, appellees state the following:

1. This is an appeal from a final order of the District Court for the Middle District of Pennsylvania granting summary

judgment in favor of appellees, Pennsylvania corrections officials who were defendants in the district court, on a claim under 42 U.S.C. §1983 by an inmate of a Pennsylvania correctional institution.

2. On October 5, 1993, a panel of this Court vacated the judgment of the district court and remanded the case.

3. The basis for the Court's decision was its determination that the district court had applied the incorrect standard to the inmate's request for appointment of counsel under 28 U.S.C. §1915(d).

4. In so doing, the Court recognized that there is no statutory right to appointed counsel in a civil case and that §1915(d) "gives district courts broad discretion to request an attorney to represent an indigent civil litigant."

Slip op. at 9.

5. The Court expressly declined to follow either the "special circumstances" standard previously adopted by the Court in Smith-Bey v. Petsock, 741 F.2d 22, 26 (3rd Cir. 1984), or the "exceptional circumstances" standard of decisions of Courts of Appeals from other circuits. Slip op. at 11-12.

6. Instead, the Court announced for the first time in this Circuit what appears to be at least a ten-prong standard that requires a district court to consider the following:

> 1) whether the claim has "arguable merit in fact and law;"
>
> 2) the plaintiff's ability to present the case;
>
> 3) if the plaintiff is a prisoner, the "restraints placed upon him or her by confinement;"

4) the difficulty of the issues;

5) the "degree to which factual investigation" is required;

6) the "extent to which prisoners and others suffering confinement may fact problems" in pursuing their claims;

7) the degree to which the plaintiff must comply with "complex discovery rules;"

8) whether the case is "likely to turn on credibility determinations;"

9) whether the case requires expert testimony; and

10) the "practical restraints" on the district courts' ability to locate willing and competent attorneys to accept appointments.

Slip op. at 13-16.

7. Thus, while recognizing that district courts possess "broad discretion" to appoint counsel and that "the determination must be made on a case-by-case basis," slip. op. at 17, the Court nonetheless has announced a multi-faceted analysis that, by the Court's own account, may affect thousands of civil rights cases annually. Slip op. at 16 n. 6.

8. The Court's newly required extended analysis not only is inconsistent with its prior decision in Smith-Bey, and the decisions of the several courts of appeals which the Court expressly declined to follow, but it also creates an unnecessarily cumbersome standard that district courts must apply at any point in the litigation. Slip op. at 15.

9. Given the numbers of cases in the district courts that the Court's analysis will affect and the importance of the

question of the appropriate analysis to be applied to requests for counsel, the Court should rehear the appeal.

WHEREFORE, appellees respectfully request that the Court grant this petition for rehearing before the panel or rehearing before the Court in banc.

Respectfully submitted,

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STATEMENT FOR REHEARING IN BANC

I express a belief, based on a reasoned and studied professional judgment, that the panal decision is contrary to the decision of the Court in Smith-Bey v. Petsock, 741 F.2d 22 (3d Cir. 1984), that consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court, and that the appeal involves a question of exceptional importance -- the appropriate standard to be applied by a district court in analyzing a request for appointment of counsel under 28 U.S.C. §1915(d).

GREGORY R. NEUHAUSER
Senior Deputy Attorney General

Filed October 5, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-7018

HARVEY TABRON,

Appellant

v.

LT. GRACE, (Lieutenant); MAJOR PRICE; CORRECT OFFICER GROSS (CORRECTIONS OFFICER), (Corrections Officer), a/k/a Perkins; SERGEANT MASKULYAK; R. SOBINA, Deputy Warden for Treatment; A. DOMOVICH, Deputy Warden Operation; THOMAS FULCOMER; M. P. COOPER

On Appeal from the United States District Court for the Middle District of Pennsylvania

(D.C. Civil No. 89-0633)

Argued April 27, 1993

Before: BECKER, HUTCHINSON and WEIS, Circuit Judges

(Filed October 5, 1993)

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OPINION OF THE COURT

BECKER, Circuit Judge

Appellant Harvey Tabron, a prisoner at the State Correctional Institution in Huntington, Pennsylvania, brought this

suit under 42 U.S.C. §1983 against eight prison officials, claiming that they had violated his constitutional rights by failing to protect him from the assault of another prisoner. Tabron appeals the denial of his request for appointment of counsel, the denial of his request for free copies of deposition transcripts, the denial of his motion to compel responses to his interrogatories, and the court's final order granting summary judgment in favor of the defendants.

The magistrate judge, see infra n.2. declined to appoint counsel, stating that counsel may be appointed to represent an indigent civil litigant under 28 U.S.C. §1915(d) only in "exceptional circumstances." We conclude that this "exceptional circumstances" limitation is not supported by §1915(d), and hence that the magistrate judge did not properly

exercise discretion whether to appoint counsel. In addition, we take this opportunity to announce some standards for appointment of counsel under §1915(d). We will vacate the judgment and remand for the district court (or the magistrate judge) to reconsider Tabron's request for counsel in accordance with these standards. If counsel is appointed, the district court should allow additional discovery. Because the record on the merits may then change, we do not address Tabron's other arguments at this time, except for his contention that the district court erred in denying his request for free copies of deposition transcripts, which we discuss for the guidance of the district court on remand. On that point, we find that the district court correctly concluded that it had no authority to provide an in forma pauperis

litigant with copies of deposition transcripts at government expense.

I. FACTS AND PROCEDURAL HISTORY

A. Background Facts

On March 21, 1989, Tabron, a prisoner at Huntington State Correctional Institution, was approached by Charles Evans, a fellow inmate, who offered to sell Tabron some marijuana cigarettes. Defendant Sgt. Francis Maskulyak, a prison guard, caught the two inmates with the marijuana and issued misconduct reports for both of them. According to Tabron's affidavit, Evans threatened Tabron with bodily harm in the presence of Sgt. Maskulyak, if Tabron did not accept responsibility for the misconduct.

Later that evening, Tabron and Evans were called to the prison control area so that prison officials could review their misconduct reports and determine whether

it was necessary to place them in temporary confinement prior to their respective misconduct hearings. Defendant Lt. James Grace, who was assigned to the control center that evening, decided not to place Evans and Tabron in pre-hearing confinement. Grace explained in his affidavit that the misconduct was a minor, nonviolent offense which normally does not require pre-hearing confinement. After sitting the two inmates down for thirty minutes of questioning and observation, Grace determined that, although they were angry with each other, there was no significant risk of physical threat or intimidation. According to Tabron's affidavit, however, Evans threatened him with bodily harm in the control center in the presence of Grace, Maskulyak, and an inmate named Donald Leonard. Grace and Maskulyak both deny that they heard Evans

made any physical threats toward Tabron.

After the meeting in the control room, both Evans and Tabron were sent back to their respective cellblocks. Tabron states in his affidavit that at about 8 a.m. on the following morning there was a "heated confrontation" between him and Evans in the presence of Grace, during which Evans repeated his threats against Tabron. At about 10 a.m., Evans approached Tabron and attacked him with a razor blade attached to the end of a pin. According to Tabron's affidavit, defendant Officer Mary Perkins was present during the assault, but chose not to intercede. Inmate Leonard, who was present during the assault, intervened and subdued Evans. Tabron suffered a laceration across his jaw that required 21 stitches, and a slash across the right side of his face that required 11 stitches.

After the assault, both Tabron (who had received medical treatment) and Evans were placed in temporary administrative custody, under the normal prison procedures that follow a violent incident. At a hearing on the following day before defendants Director of Treatment Melvin Cooper, Deputy Warden Raymond Sobina, and Major James Price, Tabron was informed that he would remain in administrative custody pending investigation of the assault, again under standard prison procedures. Later that day, at a separate hearing on the marijuana misconduct, Tabron pled guilty to the charge of possessing contraband and was released from any disciplinary confinement for that offense. Tabron was also cleared of any responsibility for the Evans assault. The hearing examiner explained, however, that Tabron's administrative confinement would

continue pending the investigation of the assault. Tabron was released from administrative confinement on March 30, 1989. At a separate hearing, Evans was found guilty of prison misconduct with respect to the assault, was given a 90-day period in lock-up, and was assessed medical costs.

B. Proceedings Before the District Court

In May 1989, Tabron brought this action pro se in the district court for the Middle District of Pennsylvania against the prison officials allegedly involved in the events surrounding the Evans assault, and against their supervisors. Tabron's complaint alleged the following: that defendants Grace and Maskulyak heard Evans threaten Tabron prior to the attack but failed to take any measures to protect him; that defendant Perkins was present during the assault and

deliberately refused to intercede; that, after the assault, Tabron was improperly placed in administrative segregation with the approval of defendants Cooper, Sobina, and Price; and that Huntington Superintendent Thomas Fulcomer, Deputy Superintendent Andre Domovich, Cooper, and Price, in their supervisory capacities, failed to prevent the assault and failed to discipline Grace, Maskulyak, and Perkins for their mishandling of the incident.

Pursuant to the local rules of the Middle District of Pennsylvania, see Middle District Rule 901, Tabron's case was assigned to a magistrate judge for pretrial proceedings. Tabron moved for appointment of counsel, see 28 U.S.C. §1915(d), arguing that he did not have the legal education or experience necessary to present his case and that he needed an

attorney to assist him with discovery. Defendants did not oppose Tabron's motion, but the magistrate judge denied it, stating in his order: "Non-compensated counsel can be appointed by the court in civil rights cases only when exceptional circumstances exist. No such circumstances exist in this case." Tabron proceeded to represent himself.

During discovery, Tabron's lack of resources and his unfamiliarity with discovery rules and tactics put him at a significant disadvantage. The defendants took depositions of Tabron, Evans, inmate Leonard (who witnessed both the assault and the subsequent meeting in the prison control area), and an additional inmate who witnessed the assault. Tabron attended and participated in the depositions but could not afford copies of the transcripts. Also unable to afford to

take his own depositions, Tabron sought written discovery. His first set of interrogatories was returned unanswered by the defendants because the six-month discovery deadline under Middle District of Pennsylvania Rule 406 had passed. Tabron moved for extension of the discovery deadline, but no action was taken on the motion, apparently because Tabron failed to file a supporting brief. Two months after his first request for an extension, Tabron renewed his motion and in August of 1990, the magistrate judge granted a 60-day extension. Tabron immediately served new interrogatories and document requests on defendants. Six weeks later, he served a second set of interrogatories.

Defendants answered 16 of the initial 40 questions in Tabron's first set of 44 interrogatories, objecting to the

remaining 24 of those first 40 questions on the ground that they were not reasonably calculated to lead to the discovery of admissible evidence. Of the 16 questions within the initial 40 to which the defendants responded, the response to nine of them was: "Defendants are still gathering information relating to this interrogatory and will supplement this response." Defendants never supplied supplementary responses to any of these questions. Defendants objected to all questions beyond the fortieth in the initial set of interrogatories and to all 98 questions in the second set on the ground that they exceeded the maximum number of 40 interrogatories per party permitted by Middle District Rule 402.8.

In February of 1991, the magistrate judge entered an order requiring that all dispositive motions be filed within 60

days. Tabron thereupon filed three discovery-related motions: a request that the court order that he be provided with copies of the transcripts of the depositions taken by defendants, a motion to compel answers to his interrogatories, and a motion to compel responses to his document requests. Defendants responded to these motions and then moved for summary judgement.

Tabron responded to the defendants' summary judgment motion, but did so without the benefit of most of the discovery information he sought and without copies of any deposition transcripts. Tabron's brief cited to the deposition testimony either from memory or by referring to pages of depositions that he had been allowed to inspect. Due to a misunderstanding between defendants' counsel and the court reporter, Tabron did

not receive a copy of his own deposition to read and sign, pursuant to Fed. R. Civ. P. 30(e), until after all of his responses to defendants' dispositive motions had been filed. Tabron also filed an affidavit in support of his opposition to the summary judgment motion, setting forth his personal knowledge of the events in question.

C. The District Court's Rulings

In September of 1991, the magistrate judge filed a report and recommendation that each of Tabron's discovery-related motions be denied and that defendants' motion for summary judgment be granted in its entirety. The magistrate judge found no statutory authority for the government to provide an in forma pauperis litigant with free copies of deposition transcripts. He concluded that Tabron's motion to compel compliance with his

document requests was moot because defendants had offered to make arrangements for Tabron to review the requested documents. As for Tabron's motion to compel responses to his interrogatories, the magistrate judge found that defendants had properly refused to answer all interrogatories beyond the first 40, the maximum number permitted by local rule. He also recommended that the court refuse to compel responses to the unanswered questions within the first 40 interrogatories because it found that those questions did not seek information relevant to the subject of the suit.

Finally, the magistrate judge recommended that summary judgment be granted in favor of all of the defendants. The report explained that the only evidence submitted by Tabron - his own affidavit detailing the events leading up

to the assault and stating that Lt. Grace and Sgt. Maskulyak had heard Evans threaten Tabron prior to the attack - was not sufficient to create a genuine issue of fact that those defendants were "deliberately indifferent" to Tabron's safety, as must be shown to prevail in an Eighth Amendment claim alleging cruel and unusual punishment in a prison context. See Wilson v. Seiter, 111 S.Ct. 2321, 2327 (1991). With respect to Tabron's claim that Officer Perkins had deliberately failed to protect him during the attack, although the magistrate judge found a dispute of fact as to whether she was present at the scene of the assault, he concluded that his dispute was not material because, even if Perkins were present, Tabron had offered no evidence to show that her failure to intervene was done "maliciously or sadistically with the

very purpose of causing harm," as must be established to prevail in an Eighth Amendment challenge to the actions of a prison official in an emergency situation. Whitley v. Albers, 475 U.S. 312, 320, 106 S.Ct. 1078, 1085 (1986).

The magistrate judge found no basis for Tabron's claims that the supervisory defendants (Fulcomer, Domovich, Sobina, Cooper and Price) had violated his Eighth Amendment rights because there was no evidence that these defendants were present during the assault or were involved in the events leading up to it, and because liability under §1983 may not be imposed under a respondeat superior theory. See Hampton v. Holmesburg Prison Officials, 546 F.2d 1077, 1082 (3rd Cir. 1976). The magistrate judge also found no basis for Tabron's claim that defendants Grace, Sobina, Cooper and Price had

deprived him of due process when they directed or approved his placement in administrative segregation. Tabron filed timely objections to the proposed findings in the report and recommendation of the magistrate judge.

The district court adopted the magistrate judge's report and recommendation with respect to each of Tabron's discovery-related motions, with the exception that the court ordered defendants to respond to two of Tabron's interrogatories that asked whether Evans had previously assaulted anyone at Huntingdon. After the defendants submitted negative responses to those two questions, the court adopted the remainder of the magistrate judge's report and recommendation and entered summary judgment in favor of defendants.

Tabron filed a timely notice of

appeal, and the district court granted Tabron leave to proceed on appeal in forma pauperis. We have jurisdiction under 28 U.S.C. §1291. Upon Tabron's motion, a panel of this court directed the clerk to appoint counsel to represent Tabron on appeal.

II. APPOINTMENT OF COUNSEL

The district court's authority to appoint counsel to represent an indigent litigant in a civil case arises under 28 U.S.C. §1915(d), which provides:

> The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

Section 1915(d) gives district courts broad discretion to request an attorney to represent an indigent civil litigant. Such litigants have no statutory right to

appointed counsel.[1]

The magistrate judge, acting under his authority to issue orders disposing of certain pretrial matters, see 28 U.S.C. §636(b)(1)(A), denied Tabron's request for appointment of counsel, stating in his order: "Non-compensated counsel can be appointed by the court in civil rights cases only when exceptional circumstances exist. No such circumstances exist in this case." (citations omitted). Tabron argues that the magistrate judge erred as a matter of law in concluding that it had no discretion to consider appointment of counsel in the absence of "exceptional circumstances." Alternatively, Tabron

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[1]In Mallard v. United States District Court, 490 U.S. 296, 109 S.Ct. 1814 (1989), the Supreme Court held that §1915(d) does not authorize a federal court to require an unwilling attorney to represent an indigent civil litigant, the operative word in the statute being "request."

contends that, even if "exceptional circumstances" must exist to warrant appointment of counsel, such circumstances were present in his case such that the magistrate judge abused his discretion in refusing to request appointed counsel.[2]

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[2]It appears from the record that Tabron never filed an objection with the district court regarding the magistrate judge's order denying his request for counsel, as is required under Middle District of Pennsylvania Rule 904.1. Normally, a party who fails to object before the district court to a magistrate judge's ruling on a non-dispositive pretrial matter waives that objection on appeal. See United Steelworkers of America v. New Jersey Zinc Co., 828 F.2d 1001, 1004-08 (3rd Cir. 1987). As a general rule, we do not consider on appeal issues that were not raised before the district court. See Americans Disabled for Accessible Public Transp. v. Skinner, 881 F.2d 1184, 1197 (3rd Cir. 1989). However, the decision whether or not to address an issue not raised before the district court "is one of discretion rather than jurisdiction," and we have addressed such issues "when prompted by exceptional circumstances." Selected Risks Ins. Co. v. Bruno, 718 F.2d 67, 69 (3rd Cir. 1983).

We are prompted to address the

appointment issue here, in spite of Tabron's failure to raise it before the district court, for several reasons. First, as we will explain, see infra, standards for appointment of counsel in a civil case under §1915(d) have not been set forth in any detail by this court. Second, on appeal, the appointment issue was briefed and argued on the merits by the parties, and the defendants never have raised waiver as a defense. Third, Tabron was a pro se litigant before the district court, and we have traditionally given pro se litigants greater leeway where they have not followed the technical rules of pleading and procedure. See Riley v. Jeffes, 777 F.2d 143, 147-48 (3rd Cir. 1985); Siers v. Morrash, 700 F.2d 113, 116 (3d Cir. 1983). Finally, Tabron's contention that the denial of his request for counsel was error is intertwined with his arguments challenging the grant of summary judgment, for he contends that the lack of counsel adversely affected his ability to produce enough evidence to survive summary judgment. Under these circumstances, we believe it is appropriate to address the appointment issue. Additionally, we note that there is no jurisdictional problem with our addressing the appointment issue. There is no defect in Tabron's notice of appeal, which appealed from the district court's summary judgment order, for we construe notices of appeal liberally, as covering unspecified prior orders if they are related to the specific order that was appealed from. See e.g., Drinkwater v. Union Carbide Corp., 904 F.2d 853, 858 (3d

Although the provision now appearing at 28 U.S.C. §1915(d) was first enacted by Congress in 1892, there is little guidance in this circuit as to what criteria district courts should use in deciding whether to grant a request for appointment of counsel. In Ray v. Robinson, 640 F.2d 474, 477-79 (3d Cir. 1981), we reversed the district court's decision to deny appointment of counsel because the court had improperly concluded that it had no power to appoint counsel to represent an indigent litigant in a civil case. We held that 28 U.S.C. §1915(d) expressly gave the court discretionary authority to appoint counsel and that the district court, through the magistrate, had failed to exercise that discretion. Id. at 477-78. However, we did not elaborate on the

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Cir. 1990); Williams v. Guzzardi, 875 F.2d 46, 49-50 (3d Cir. 1989).

standards district courts should apply in exercising their discretion under §1915(d), stating only:

> Because of the diverse nature of the cases in which motions to appoint counsel are made, we deem it inadvisable to establish any general standard as to when counsel should be appointed. The factors which courts have considered in making such decisions are available in the case law.

Id. at 478 (citation omitted).

Smith-Bey v. Petsock, 741 F.2d 22 (3d Cir. 1984), is the only other case in which this court addressed the standards for appointment of counsel under §1915(d). The plaintiff in Smith-Bey appealed directly from the district court's order denying his request for court-appointed counsel under §1915(d). Although we dismissed the appeal for lack of appellate jurisdiction, and therefore never reached plaintiff's claim that the district court

erred in failing to appoint counsel,[3] we did observe that:

> [T]he appointment of counsel for an indigent plaintiff in a civil case under 28 U.S.C. §1915(d) is discretionary with the court and is usually only granted upon a showing of special circumstances indicating the likelihood of substantial prejudice to him resulting, for example, from his probable inability without such assistance to present the facts and legal issues to the court in a complex but meritorious case.

Id. at 26.

Defendants point to this language in Smith-Bey as support for the magistrate judge's statement that appointment of counsel under §1915(d) is permissible "only when exceptional circumstances exist." But the dicta in Smith-Bey states

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[3]We held that the appeal was interlocutory and that it did not fall within the narrow class of immediately appealable interlocutory orders under Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221 (1949), Smith-Bey, 741 F.2d at 23-25.

that appointment is "discretionary with the court" and "is usually only granted upon a showing of special circumstances." Id. (emphasis added). We therefore do not read this language to support the magistrate's conclusion that appointment is permissible only in exceptional circumstances and that, in the absence of such circumstances, the court has no discretion to appoint counsel.

The defendants also rely on cases from other circuits which state that under §1915(d), appointment of counsel to represent an indigent civil litigant is justified only in "exceptional circumstances." See, e.g., Lavado v. Keohane, 992 F.2d 601, 605-06 (6th Cir. 1993) ("Appointment of counsel in a civil case...is a privilege that is justified only by exceptional circumstances.") (internal quotations and citations

omitted); Fowler v. Jones, 899 F.2d 1088, 1096 (11th Cir. 1990)(same); Cookish v. Cunningham, 787 F.2d 1, 2 (1st Cir. 1986) ("[A]n indigent litigant must demonstrate exceptional circumstances in his or her case to justify the appointment of counsel."); Aldabe v. Aldabe, 616 F.2d 1089, 1093 (9th Cir. 1980) ("[T]his court has limited the exercise of [the power to appoint counsel under §1915(d)] to exceptional circumstances.") (citations omitted); Cook v. Bounds, 518 F.2d 779, 780 (4th Cir. 1975) ("In civil actions the appointment of counsel should be allowed only in exceptional cases...").

To the extent that these cases impose a substantive restriction on the district courts' discretion to appoint counsel

under §1915(d),[4] we decline to follow them. Section 1915(d) provides that "[t]he court may request an attorney to represent any such person unable to employ counsel." (emphasis added). Nothing in this clear language suggests that appointment is permissible only in some limited set of circumstances. Nor have we found any indication in the legislative history of the provision to support such a

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[4]Because the courts of appeals in these cases were reviewing discretionary district court decisions refusing to appoint counsel, it may be that the pronouncements that counsel may be appointed under §1915(d) only in "exceptional circumstances" reflect the deferential standard of review, i.e., that a court of appeals will reverse a district court's exercise of discretion against appointment of counsel only in exceptional circumstances. It is undisputed that, because 28 U.S.C. §1915(d) gives the district courts broad discretion to appoint counsel, the courts of appeals should reverse that exercise of discretion only where the party seeking appointment has shown that the district court's decision not to appoint counsel was clearly an abuse of discretion.

limitation. Accordingly, we conclude that the magistrate judge erred as a matter of law in stating that he had no discretion to appoint counsel in the absence of "exceptional circumstances."

The Courts of Appeals for the Second and Seventh Circuits, rejecting the strict "exceptional circumstances" requirement applied in other circuits, have provided district courts with a set of general standards for appointing counsel in the context of §1915(d). See Hodge v. Police Officers, 802 F.2d 58 (2d Cir. 1986); Maclin v. Freake, 650 F.2d 885 (7th Cir. 1981)(per curiam). We take this opportunity to follow their example. In so doing, we elaborate upon Smith-Bey by delineating further criteria for the "special circumstances" under which counsel may be appointed for an indigent litigant in a civil case.

First, as the Seventh Circuit explained in Maclin, the district court must consider as a threshold matter the merits of the plaintiff's claim. "[B]efore the court is justified in exercising its discretion in favor of appointment, it must first appear that the claim has some merit in fact and law." Maclin, 650 F.2d at 887 (quoting Spears v. United States, 266 F.Supp. 22, 25-26 (S.D.W.Va. 1967)); see also Rayes v. Johnson, 969 F.2d 700, 703 (8th Cir.) ("The appointment of counsel should be given serious consideration if the [indigent] plaintiff has not alleged a frivolous or malicious claim and the pleadings state a prima facie case.") (internal quotations and citations omitted), cert. denied, 113 S.Ct. 658 (1992). If the district court determines that the plaintiff's claim has arguable

merit in fact and law, the court should then consider a number of additional factors that bear on the need for appointed counsel.

The plaintiff's ability to present his or her case is, of course, a significant factor that must be considered in determining whether to appoint counsel. See Hodge, 802 F.2d at 61; Maclin, 650 F.2d at 888. Courts generally should consider the plaintiff's education, literacy, prior work experience, and prior litigation experience. An indigent plaintiff's ability to present his or her case may also depend on factors such as the plaintiff's ability to understand English, see Castillo v. Cook County Mail Room Dept., 990 F.2d 304 (7th Cir. 1993) (instructing district court to appoint counsel on remand to represent indigent plaintiff who had difficulty with the

English language), or, if the plaintiff is a prisoner, the restraints placed upon him or her by confinement, see Rayes, 969 F.2d at 703-04 (reversing denial of request for counsel where indigent prisoner was severely hampered in pressing his claims by conditions of confinement making him unable to use typewriter, photocopying machine, telephone, or computer). Where applicable, these factors should be considered.

If it appears that an indigent plaintiff with a claim of arguable merit is incapable of presenting his or her case, serious consideration should be given to appointing counsel, see, e.g., Gordon v. Leeke, 574 F.2d 1147, 1153 & n.3 (4th Cir.), cert. denied, 439 U.S. 970, 99 S.Ct. 464 (1978), and if such a plaintiff's claim is truly substantial, counsel should ordinarily be appointed.

The decision whether to appoint counsel will also be informed by a number of other factors, to which we now turn.

In conjunction with the consideration of the plaintiff's capacity to present his or her case, the court must also consider the difficulty of the particular legal issues. The court "should be more inclined to appoint counsel if the legal issues are complex." Hodge, 802 F.2d at 61. As the Seventh Circuit stated in Maclin, "where the law is not clear, it will often best serve the ends of justice to have both sides of a difficult legal issue presented by those trained in legal analysis." 650 F.2d at 889.

Other key factors are the degree to which factual investigation will be required and the ability of the indigent plaintiff to pursue such investigation. See Hodge, 802 F.2d at 61; Maclin, 650

F.2d at 887-88. More generally, the court may also consider the extent to which prisoners and others suffering confinement may face problems in pursuing their claims. Additionally, where the claims are likely to require extensive discovery and compliance with complex discovery rules, appointment of counsel may be warranted. See Rayes, 969 F.2d at 703 (reversing district court's denial of request for appointment of counsel in part because conditions of indigent prisoner's confinement severely disadvantaged him in discovery).

Similarly, when a case is likely to turn on credibility determinations, appointment of counsel may be justified. See Maclin, 650 F.2d at 888 ("[C]ounsel may be warranted where the only evidence presented to the factfinder consists of conflicting testimony."). The Maclin

court explained that when witness credibility is a key issue, "it is more likely that the truth will be exposed where both sides are represented by those trained in the presentation of evidence and in cross examination." Id.; accord Hodge, 802 F.2d at 61; see also Manning v. Lockhart, 623 F.2d 536, 540 (8th Cir. 1980) (holding that district court abused its discretion in refusing to appoint counsel where claims were nonfrivolous and question of fact turned on witness credibility). Along the same lines, appointed counsel may be warranted where the case will require testimony from expert witnesses. See Moore v. Mabus, 976 F.2d 268, 272 (5th Cir. 1992) (district court erred in denying request for counsel to represent indigent civil litigant whose case required testimony from experts on HIV-AIDS management in prison environment).

Additionally, we emphasize that appointment of counsel under §1915(d) may be made at any point in the litigation and may be made by the district court sua sponte. See, e.g., Castillo v. Cook County Mail Room Dept., 990 F.2d 304 (7th Cir. 1993) (ordering district court to appoint counsel to represent indigent civil litigant who had difficulty with English language even though litigant had never requested assistance of counsel). Accordingly, even if it does not appear until trial (or immediately before trial) that an indigent litigant is not capable of trying his or her case, the district court should consider appointment of counsel at that point.[5]

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[5]Of course, before appointing counsel under §1915(d), courts should consider whether an indigent plaintiff could retain counsel on his or her own behalf. If counsel is easily attainable and affordable by the litigant, but the

Finally, in addressing this issue, we must take note of the significant practical restraints on the district courts' ability to appoint counsel: the ever-growing number of prisoner civil rights actions filed each year in the federal courts; the lack of funding to pay appointed counsel; and the limited supply of competent lawyers who are willing to undertake such representation without compensation.[6] We have no doubt that

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plaintiff simply has made no effort to retain any attorney, then counsel should not be appointed by the court. See Cooper v. A. Sargenti Co., 877 F.2d 170, 172 (2d Cir. 1989). But see infra n.6 and accompanying text, discussing the lack of counsel willing to represent indigent civil litigants, especially prisoners.

[6]In his comprehensive article on the problems faced by prisoners who bring civil rights actions, Dean Eisenberg points out that there are very few organizations that provide legal assistance to prisoners in civil rights cases. See Howard S. Eisenberg, Rethinking Prisoner Civil Rights Cases, 17 S. Ill. L.J. 417, 462-66 (1992). He

there are many cases in which district courts seek to appoint counsel but there are simply none willing to accept appointment.[7] It is difficult to fault a

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explains that approximately 25,000 prisoner civil rights cases are filed each year under §1983, and, although the majority of these cases are frivolous, many are not. Id. at 482. Yet there are few attorneys who are willing to provide free legal assistance to prisoners in civil rights cases. See id. at 462-66. The possibility of obtaining attorneys fees under 42 U.S.C. §1988 is generally not a sufficient financial inducement, for fees thereunder depend upon success in the litigation, and the prospective amount of recovery in most prisoner civil rights cases is usually small. See id. at 477.

[7] As we have explained, courts have no authority to compel counsel to represent an indigent civil litigant. See supra n. 1. We note in this regard that the frequent unwillingness of lawyers to accept appointment in such cases is not only a function of the time pressures lawyers face in trying to earn a living in an increasingly competitive field, but also by circulating knowledge of the indignities that some lawyers have been subjected to by certain litigants, including verbal and written abuse, excessive demands and complaints, and malpractice suits. We trust that district judges will be sensitive to such problems

district court that denies a request for appointment under such circumstances. We note, however, with cautious optimism, that more lawyers are taking on the responsibility of providing pro bono legal services to indigent litigants. Representation of indigent litigants is not only an important responsibility of members of the bar, but it also provides an excellent opportunity for newer attorneys to gain courtroom experience. In Mallard v. United States District Court, 490 U.S. 296, 310, 109 S. Ct. 1814, 1823 (1989), Justice Brennan wrote for the Court: "[I]n a time when the need for legal services among the poor is growing and public funding for such services has not kept pace, lawyers' ethical obligation to volunteer their time and skills pro

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in making discretionary decisions in this area.

bono publico is manifest." We encourage lawyers within this circuit to volunteer for such service, and we urge the district courts in this circuit to seek the cooperation of the bar in this regard.

We also emphasize that volunteer lawyer time is extremely valuable. Hence, district courts should not request counsel under §1915(d) indiscriminately. As the Court of Appeals for the Second Circuit has warned:

> Volunteer lawyer time is a precious commodity. . . . Because this resource is available in only limited quantity, every assignment of a volunteer lawyer to an undeserving client deprives society of a volunteer lawyer available for a deserving cause. We cannot afford that waste.

Cooper v. A. Sargenti Co., 877 F.2d 170, 172 (2d Cir. 1989).

The list of factors we have provided

to guide district courts in determining whether to appoint counsel under §1915(d) is not meant to be exhaustive. We emphasize that appointment of counsel remains a matter of discretion; section 1915(d) gives district courts broad discretion to determine whether appointment of counsel is warranted, and the determination must be made on a case-by-case basis. See Hodge, 802 F.2d at 60; Maclin, 650 F.2d at 886; cf. Rowland v. California Men's Colony, Unit II Men's Advisory Council, 113 S. Ct. 716, 721 (1993) (discussing the "permissive language" of §1915(d). A district court's decision to deny counsel under §1915(d), however, is reviewable by a court of appeals for abuse of discretion. Moreover, where the district court has failed to provide reasons for its decision to deny an indigent civil litigant's

request for counsel, the court of appeals in some cases may have to remand, for, without the district court's reasons, the appellate court may not be able to determine whether the district court made a reasoned and informed judgment regarding appointment of counsel. See Rayes, 969 F.2d at 704-05. It therefore would be desirable for the district court to explain the reasons for its decision.

The magistrate judge in this case applied the incorrect standard for appointment of counsel and offered no other reasons for its denial of Tabron's request for counsel. Therefore, we will vacate the summary judgment order and will remand for the district court or the magistrate judge to reconsider Tabron's request for appointment of counsel in accordance with the standards set forth in this opinion.

A number of the factors we have recited are obviously relevant to Tabron's request for appointment of counsel. The discovery rules in the Middle District of Pennsylvania are complex and were difficult for Tabron to contend with. Tabron's lack of legal experience clearly put him at a disadvantage countering the defendants' discovery tactics, such as the defendants' failure to supplement their responses, as promised, to nine of the sixteen interrogatories to which they responded. Moreover, the case involves credibility determinations, since several witnesses dispute certain relevant facts. In addition, Tabron's incarceration may have limited his ability to engage in factual investigation. On the other hand, the legal issues in this case do not appear to be complex, and the applicable law is clear. Also, based on his papers,

Tabron appears to be literate and reasonably capable.

At all events, the district court (or the magistrate judge) must decide the issue in the first instance, including the critical threshold determination of whether Tabron's case has arguable merit in fact and law. While we are inclined to think that it does, the district court is in better position to make that judgment. If the court determines that counsel should be appointed, the court should then allow reasonable additional discovery. Since in such event the record on the merits may change, we do not address Tabron's other arguments at this time, except for the question of free copies of deposition transcripts, which we address for the guidance of the district court on remand.

III. REQUEST FOR FREE COPIES OF DEPOSITION TRANSCRIPTS.

Tabron submits that, in light of his in forma pauperis status, the district court erred in refusing to grant his motion to obtain free copies of transcripts of the depositions taken by defendants.[8] The district court, approving the recommendation of the magistrate judge, concluded that it had no authority under 28 U.S.C. §1915, or any other statute, to order the government to pay for deposition transcripts for an indigent litigant. We agree.

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[8] After counsel was appointed for Tabron on appeal, copies of the depositions were obtained by counsel. The issue, however, is not moot because Tabron's lack of copies of the depositions adversely affected his ability to respond to defendants' dispositive motions. Thus, if the court erred in denying Tabron's request for copies of the transcript, that error could be reversible.

The in forma pauperis statute, 28 U.S.C. §1915, permits the waiver of prepayment of fees and costs for in forma pauperis litigants, see 28 U.S.C. §1915(a), and allows payment by the United States of the expenses of "printing the record on appeal in any civil or criminal case, if such printing is required by the appellate court," and of "preparing a transcript of proceedings before a United States magistrate in any civil or criminal case, if such transcript is required by the district court . . .," 28 U.S.C. §1915(b). There is no provision in the statute for the payment by the government of the costs of deposition transcripts, or any other litigation expenses, and no other statute authorizes courts to commit federal monies for payment of the necessary expenses in a civil suit brought by an indigent litigant. See Moss v. ITT

Continental Baking Co., 83 F.R.D. 624, 625 (E.D. Va. 1979) (quoting Haymes v. Smith, 73 F.R.D. 572, 574 (W.D.N.Y. 1976)).

In Boring v. Kozakiewicz, 833 F.2d 468 (3d Cir. 1987), cert. denied, 485 U.S. 991, 108 S. Ct. 1298 (1988), we rejected an indigent civil litigant's argument that the district court erred in refusing to have the government pay for an expert medical witness. We explained:

> Congress has authorized the courts to waive the prepayment of such items as filing fees and transcripts if a party qualifies to proceed in forma pauperis. 28 U.S.C. §1915. However, we have been directed to no statutory authority nor to any appropriation to which the courts may look for payment of expert witness fees in civil suits for damages.

Id. at 474; accord Tedder v. Odel, 890 F.2d 210, 212 (9th Cir. 1989); McNeil v. Lowney, 831 F.2d 1368, 1373 (7th Cir. 1987), cert. denied, 485 U.S. 965, 108 S.

Ct. 1236 (1988). Similarly, we conclude that there is no statutory authority for a court to commit federal funds to pay for deposition transcripts. Several other courts have similarly held. See In re Richard, 914 F.2d 1526, 1527 (6th Cir. 1990) (Section 1915 "does not give the litigant a right to have documents copied and returned to him at government expense."); Lewis v. Precision Optics, Inc., 612 F.2d 1074, 1075 (8th Cir. 1980) (rejecting plaintiff's claim that district court erred in not requiring the government to pay for deposition expenses or copies of records); Doe v. United States, 112 F.R.D. 183, 185 (S.D.N.Y. 1986) (same); Toliver v. Community Action Commission to Help Economy, Inc., 613 F.Supp. 1070, 1072 (D.S.N.Y. 1985) ("[t]here [is] no clear statutory authority for prepayment of discovery

costs [pursuant to 1915 or otherwise]"); Sturdevant v. Deer, 69 F.R.D. 17, 19 (E.D. Wis. 1975) (§1915 does not authorize federal funds for the "cost of taking and transcribing a deposition").

Tabron argues alternatively that, even if §1915 does not authorize the courts to order the provision of copies of deposition transcripts to an indigent civil litigant at government expense, it was within the equitable powers of the district court to order the defendants to pay for deposition transcripts for Tabron as a condition for taking the depositions. Tabron points to Haymes v. Smith, 73 F.R.D. 572 (W.D.N.Y. 1976), where the court, exercising its general discretion over discovery matters, ordered the defendant to advance the indigent plaintiff's travel expenses because the plaintiff had to depose the defendant

outside of the district where the action was brought. See also Robbins v. Abrams, 79 F.R.D. 600, 602 (S.D.N.Y. 1978) (court ordered defendant to pay stenographic and translation costs for depositions taken by plaintiff in Europe because repeat depositions were necessitated by defendant's bad faith and deceitfulness in previous depositions).

We agree that, as part of the inherent equitable powers of the district court in supervising discovery, a district court may, under some circumstances, exercise its discretion to order an opposing party to pay for or to provide copies of deposition transcripts for an indigent litigant as a condition for allowing that party to take depositions. Cf. Navarro de Cosme v. Hospital Pavia, 922 F.2d 926, 930 (1st Cir. 1991) (holding that district court order requiring each

party to pay for adversaries' expenses in connection with taking of depositions, was well within the broad latitude of district court in managing discovery). However, the magistrate judge declined to do so here after finding that copies of the transcripts were not necessary for Tabron to make his case, at least at the summary judgment stage. He explained in his report that Tabron attended and participated in all of the depositions and therefore was able to take notes and compile information from the testimony. Further, the magistrate judge noted that Tabron had not demonstrated in any of this papers why he needed copies of the transcripts to defend against defendants' motion for summary judgment.

Given that, as a general rule, indigent litigants bear their own

litigation expenses, at least initially,[9] see Doe, 112 F.R.D. at 184, we cannot say that the district court's decision not to order defendants to provide Tabron with copies of the deposition transcripts was an abuse of discretion. Accordingly, we will affirm the court's denial of Tabron's motion to obtain copies of the deposition transcripts. Inasmuch as there may be additional discovery on remand, the principles we have announced should be of help to the district court on further rulings in the discovery area.

IV. CONCLUSION

For the foregoing reasons, we will vacate the judgment and remand the case to

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[9] Of course, deposition expenses, including the costs of deposition transcripts, may be awarded as costs to the prevailing party if the court determines, at the end of the litigation, that the copies were of papers necessary for use in the case. See 28 U.S.C. §1920.

the district court for further proceedings consistent with this opinion.

A True Copy:

Teste:

Clerk of the United States Court
of Appeals for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

HARVEY TABRON, Plaintiff	:	C.A. #3:CV-89-0633
v.	:	
LIEUTENANT GRACE, et al., Defendants	:	

MEMORANDUM AND ORDER

On December 2, 1991 this court issued an order directing defendants to respond, in camera, to plaintiff's interrogatories numbered 19 and 20. These interrogatories essentially seek information relative to inmate Evan's propensity for assaultive behavior. Defendants have complied with the December 2, 1991 order and the submission indicates no such propensity exists. The documents submitted by defendants will be disclosed to plaintiff and made part of the record. No sealing is required.

Accordingly, IT IS HEREBY ORDERED THAT:

(1) The recommendation of Magistrate Judge Durkin that defendants' motion for summary judgment be granted is adopted.

(2) Judgment be and is hereby entered in favor of defendants and against plaintiff.

(3) Defendant's answers to plaintiff's interrogatories numbered 19 and 20 are to be filed of record and the Clerk of Court is directed to mail a copy of same to plaintiff.

(4) It is certified that any appeal from this order will be deemed frivolous and not taken in good faith.

(5) The Clerk of Court is directed to close the file.

SYLVIA H. RAMBO
UNITED STATES DISTRICT JUDGE

Dated: December 18, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

HARVEY TABRON Plaintiff	:	C.A. #3:CV-89-0633
v.	:	
LIEUTENANT GRACE, et al., Defendant	:	

MEMORANDUM AND ORDER

Before the court is a report and recommendation of the magistrate judge in which he addresses three pending motions. The first motion is a request by plaintiff, who is proceeding in forma pauperis, that he be supplied with free copies of deposition transcripts. The second motion is plaintiff's motion to compel in which he seeks answers from defendants to interrogatories. The third motion is defendants' motion for summary judgment. Plaintiff has filed objections

to the report.

As to the first motion, the magistrate judge correctly found that 28 U.S.C. §1915 only permits a suit to be filed without prepayment of costs; it does not permit the waiver of other costs of litigation. See Boring v. Kozakiewicz, 833 F.2d 468 (3d Cir. 1987), cert. denied, 488 U.S. 934 (1988). The fact that the magistrate judge erroneously noted that plaintiff had the opportunity to review the deposition for corrections is of no moment. Plaintiff was present for the taking of depositions and could have made notes of important, relevant information.

As to the second motion, the magistrate judge correctly denied the motion to compel as to all interrogatories for which plaintiff did not seek permission to file pursuant to Rule 402.8 of the Middle District Rules of Court.

With regard to the rulings on requests for production numbered 8, 9, 13, 17 and 18, no objections have been filed.

With regard to rulings on specific interrogatories, plaintiff has objected to the ruling on numbers 13 to 15, and 16 through 18. The magistrate judge ruled that interrogatories 13 to 15 seek information relating to March 21, 1989 and not March 22, 1989, the day of the incident. Plaintiff argues that numbers 13 to 15 seek to get the names of inmates who were housed in his unit on March 21, 1989 (the day the misconduct was issued) as potential witnesses. While these requests may be relevant, plaintiff has not argued how this information defeats the summary judgment motion.

As to interrogatories 17 and 18, plaintiff argues that information about Evans' meal schedule and work schedule

would show that Evans was in an unauthorized area, thereby showing negligence on the part of the staff in permitting the altercation to happen. As the magistrate judge noted, negligence is insufficient to support an eighth amendment violation.

Interrogatories numbered 19 and 20 seek information as to whether Evans had previously assaulted anyone at the State Correctional Institution at Huntingdon. If that information exists, plaintiff argues that this imputes knowledge to the defendants of Evans' propensity for assaults and the corresponding duty on the part of prison officials to prevent the assaults. Whether the actions of defendants Grace and Maskulzak were adequate on March 21, 1989 may or may not be affected by Evans' prior record of threats.

This court will defer ruling on the motion for summary judgment pending in camera submission to the court by defendants of Evans' disciplinary record at the State Correctional Institution at Huntingdon.

Accordingly, IT IS HEREBY ORDERED THAT:

(1) The report and recommendations of Magistrate Judge Durkin are adopted in part, rejected in part, and deferred in part.

(2) Plaintiff's motion to obtain deposition transcripts is denied.

(3) Plaintiff's motion to compel production of documents is denied.

(4) Plaintiff's motion to compel answers to interrogatories is denied except for interrogatories seeking information as concerning Evans' propensity for assaults, fights, etc.

(4) The answers, information or documents relating to assaultive behavior by Evans' shall be submitted in camera to the court no later than December 13, 1991.

(5) Disposition of the summary judgment motion is deferred pending receipt by the court of the information in ¶4.

SYLVIA H. RAMBO
UNITED STATES DISTRICT JUDGE

Dated: December 2, 1991.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

HARVEY TABRON, Plaintiff	:	C.A. No: 89-0633
v.	:	(RAMBO,J.)
	:	(DURKIN,M.J.)
LIEUTENANT GRACE, et al Defendant	:	

REPORT AND RECOMMENDATION

Plaintiff, a prisoner at the state correctional institution at Huntingdon, PA, brought this action pursuant to 42 U.S.C. §1983 in which he alleges that the defendants failed to protect him from an attack by another prisoner, Charles Evans, failed to come to his aid when he was attacked by the prisoner, and placed him in administrative custody in the prison's restricted housing unit even though he was innocent of any wrongdoing in connection with the attack. The defendants are the

following individuals employed at all relevant times at Huntingdon: Thomas A. Fulcomer, Superintendent; Andrew Domovich, Deputy Superintendent for Operations; Raymond J. Sobina, Deputy Superintendent for Treatment; Melvin P. Cooper, Director of Treatment; James S. Price, Major of the Guard; James L. Grace, Corrections Officer III (Lieutenant); Francis R. Maskulyak, Corrections Officer II (Sergeant); and Mary Kay (Gross) Perkins, Corrections Officer I.

By way of background, defendants originally responded to the complaint by filing a motion to dismiss the complaint on the ground that it failed to state a claim upon which relief can be granted. (Doc. No. 7). After obtaining extensions of time within which to file a supporting brief, the defendants withdrew their motion (Doc. No. 14) and, instead, filed

an answer. (Doc. No. 12). In withdrawing the motion to dismiss, defendants indicated that because of a decision of the Third Circuit which was issued since the filing of their motion to dismiss, defendants believed that it would be preferable from a procedural standpoint to instead answer the pleading. (Doc. No. 14).

Thereafter, the parties undertook substantial discovery and both sides requested and were granted extensions of the discovery deadline. By order dated July 11, 1990, this case, which had been originally assigned to the late Judge Herman, was reassigned to Judge Rambo. (Doc. No. 28). By order dated October 18, 1990, defendants were granted an extension of time to October 24, 1990, within which to respond to plaintiff's discovery request consisting of one set of

interrogatories and two requests for production of documents. (Doc. No. 30 and 31).

Because it appeared the parties had sufficient time to engage in discovery, the magistrate judge, on February 1, 1991, issued an order directing that any dispositive motions in this case be filed within sixty days, and the parties were advised that if no such motions were filed within that time it would be recommended that this case be set down for trial. (Doc. No. 32).

On March 25, 1991, plaintiff filed a "Motion to Obtain Deposition Transcripts In Forma Pauperis pursuant to Fed. R. Civ. P. 30(f)(2)" (Doc. No. 33). On April 1, 1991, plaintiff filed a motion to compel discovery of documents pursuant to Fed. R. Civ. P. Rule 37. (Doc. No. 34). On April 3, 1991, plaintiff filed a "Motion to

Compel Discovery on Interrogatories Pursuant to Fed. R. Civ. P. 37." (Doc. No. 35). On April 2, 1991, defendants filed a motion for summary judgment (Doc. No. 36), together with a statement of undisputed facts. (Doc. No. 37). On April 5, 1991, defendants filed a memorandum in response to plaintiff's motion to obtain deposition transcripts. (Doc. No. 38).

On April 9, 16 and 18, 1991, defendants filed motions for an enlargement of time to respond to plaintiff's pending motion to compel discovery of documents and to compel discovery of interrogatories, and a motion for an enlargement of time within which to file their brief in support of their motion for summary judgment. (Doc. Nos. 39-41). These extensions of time were granted. (Doc. Nos. 42-44). On April 23,

1991, defendants sought a further enlargement of time within which to file their response to plaintiff's motion to compel discovery of documents (Doc. No. 45) and this request was granted. (Doc. No. 46). On April 29, April 30, and May 2, 1991, defendants requested additional enlargement of times to respond to plaintiff's discovery motions as well as to file a brief in support of their motion for summary judgment. (Doc. Nos. 47-49). The record reflects that certain of these motions were granted. (Doc. No. 50). On May 13, 1991, defendants filed yet another request for an extension of time within which to file a brief in support of their motion for summary judgment. (Doc. No. 51).

On May 14, 1991, defendants filed their brief in opposition to plaintiff's motion to compel production of documents.

(Doc. No. 52). On May 28, 1991, defendants filed their brief in support of their motion for summary judgment (Doc. No. 54) and on May 31, 1991, defendants filed their brief in opposition to plaintiff's motion to compel responses to interrogatories. (Doc. No. 55).

Plaintiff then asked for an extension of time to respond to defendants' motion for summary judgment. (Doc. No. 56). This request was granted. (Doc. No. 57). On July 1, 1991, plaintiff filed his brief in opposition to defendants' motion for summary judgment. (Doc. No. 59). After requesting and receiving an extension of time within which to file a reply brief, defendants filed their brief in reply to plaintiff's opposition to defendants' motion for summary judgment on August 21, 1991. (Doc. No. 63).

Turning first to defendants' motion

to obtain deposition transcripts in form pauperis, Tabron's motion is made pursuant to Fed. R. Civ. P. 30(f)(2) which provides that deposition transcripts shall be provided on payment of the required charges. Tabron is apparently now asking the court to pay the relevant court reporters for copies of the transcript. The statute which authorizes in forma pauperis status, 28 U.S.C. §1915 only permits a suit to be filed without pre-payment of costs; it does not permit any other costs of litigation including discovery related cost to be borne for in forma pauperis litigants. See Boring v. Kozakiewicz, 833 Fed. 2d 468 (3d Cir. 1987), cert. denied, 488 U.S. 934 (1988); Hargrove v. Marks, Civil No. 82-0290 (M.D. Pa., order of 8/3/82) (att. to Doc. No. 38). Indeed, a party proceeding in forma pauperis can be held libel not just for

his own costs but also for those of his opponents if the action results in judgment for the opponents. See, e.g., Taylor v. Domovich, No. 1:CV-90-1491 (M.D. Pa.) (Attached to Doc. No. 38).

Moreover, as defendants point out Tabron reserved the right to read and sign his own deposition and in line with that request, the transcript was forwarded to him for his review and signature. This, obviously, afforded him an opportunity to make any notes he may have needed with respect to his deposition testimony. Defendants also note that Tabron attended and participated in the depositions of the other three inmates identified and at those times he had an opportunity to compile any relevant information about their testimony.

Plaintiff has not filed a reply brief in an attempt to dispute these assertions.

Moreover, he has not indicated that he needs these transcripts to defend against the motion for summary judgment. Indeed, the motion for summary judgment was filed after plaintiff's motion to obtain the transcripts. Therefore, this motion should be denied.

Turning to plaintiff's motion to compel discovery of documents, Tabron served two sets of production requests, one dated September 7, 1990 and another dated September 12, 1990. Defendants responded to both on October 24, 1990. In their responses to some of Tabron's requests, defendants indicated that they would produce documents for his inspection and copying. Some requests were objected to either in their entirety or in part.

At the time defendants responded to Tabron's request for production, counsel sent Tabron a letter indicating, among

other things, that she would make arrangements with the staff at Huntingdon to produce the documents for his inspection and copying. To this end counsel contacted an appropriate staff member at the prison to discuss the necessary arrangements. It was counsel's intention to have Tabron and the staff members set up an appointment for him to examine the documents. Once the appointment was made counsel planned to forward the documents to the staff member to provide to Tabron. However, there was some mixup in making these arrangements. It appears that the part about setting up a time with Tabron for the production was misunderstood and as a result, counsel and the staff member each thought the other would be taking care of this detail. As a result of this miscommunication, counsel was never advised as to whether a date and

time for the production had been agreed upon and never forwarded the documents. Since Tabron did not mention anything about this until he submitted the pending motions, counsel did not become aware of this problem until that time.

Tabron now asks that defendants be ordered to produce these documents they agreed to provide to him and that the court compel defendants to produce the documents which are the subject of requests numbered 8, 9, 13, 17 and 18 of the discovery dated September 7, 1991.

With respect to the first part of the motion to compel, defendants in their response have pointed to the mix-up which has occurred and have indicated that they would promptly make those documents available to Tabron. Tabron has not filed a reply and thus, there is no indication the documents have not been made

available. Thus, this part of the motion is moot.

With respect to that part of Tabron's motion which seeks to compel production of the documents that are the subject of the five requests identified above, defendants indicate as regards request number 8, since Tabron has narrowed this request in his brief by identifying the documents he desires to be produced, defendants will make those documents available to Tabron. Tabron has not filed any reply or other document to indicate that the defendants have not complied with their representation to make these available. Thus, this request is also moot.

With respect to the documents related to request number 9, defendants object to the relevancy of these documents but, nevertheless, indicate as they have previously indicated in their response,

there is no reason to believe that any documents fitting this description are in the care, custody, or control of defendants. Plaintiff has not submitted a reply and, therefore, has not in any way disputed or otherwise indicated that this response is not accurate.

With respect to the documents related to request number 13, defendants have set out their understanding of this request, even though it is partially duplicative of number 16 in the same set. They have agreed to make the documents available to Tabron. Defendants have indicated that if they misapprehended Tabron's explanation of what he wants, defendants will be happy to supplement their response. Tabron has filed no reply or other document which indicates that he is dissatisfied with this response and thus the motion to compel production of these documents is

also moot.

With respect to request number 17, defendants state that even after Tabron's "clarification" in his brief, defendants still cannot tell what he is seeking by way of documents. Defendants point out that it appears that Tabron is assuming that the PRC either conducted some formal investigation into the assault incident which is the basis for this suit or that they otherwise prepared a report on that particular subject involving Evans. Defendants point out that they have no reason to believe that any such document exists and as far as they are aware the only documents which the PRC might have prepared mentioning Evans and this incident would be any decisions on appeals for misconducts issued in connection with the incident and a monthly period review of Evans' confinement in the restricted

housing unit. They indicate that all of the former documents will be produced for Tabron in connection with the other requests, such as number 16 and number 13; that the latter documents would be prison records pertaining to Evans which are not subject to discovery. They indicate that request number 18 also deals with similar prison records regarding Evans which are treatment records and are privileged. Eaddy v. Meiron, Civil Action No. 89-0553 (M.D. Pa. 11/15/90), and Magistrate Judge's Report of 9/25/90) (copies attached to Doc. No. 52). Once again, plaintiff has not filed a reply to dispute the contentions and the law cited by plaintiff to the effect that these treatment records of Evans are privileged. Therefore, this request should be denied.

Turning now to the defendants' motion to compel response to interrogatories, the

interrogatories which are the subject of Tabron's motion are contained in two separate sets of discovery, one dated September 2, 1990, and another dated October 10, 1990. Tabron's September 2nd set of interrogatories was comprised of a total of ninety-eight interrogatories. The first forty-four were directed to all of the defendants, the remaining fifty-four were sub-divided into groups directed to particular defendants. Defendants responded to the first forty of Tabron's interrogatories but objected to the remainder on the ground that they exceeded the number permitted under local rules of court. See Rule 402.8, M.D. Pa. Of the forty interrogatories to which defendant responded they interposed objections to twenty-four on relevancy and other grounds.

Tabron's October 10th interrogatories

totaled forty-eight in number. Defendants objected to all of them on the ground that they exceeded the number permitted Tabron under the local rules.

Tabron's pending motion basically seeks to compel defendants to answer all of those interrogatories in both sets to which defendants have objected.

Plaintiff was given to October 29, 1991, to complete his discovery. The responses to the two sets of interrogatories referred to above were served on him on September 2 and October 10, 1990. In those responses he was told that many of the interrogatories were objected to on the basis that they exceeded the number permitted by local rule. Yet, he took no steps to obtain permission to serve interrogatories beyond the number permitted in the local rule. Instead he waited until April 3, 1991, or

long after the discovery deadline and substantially after the magistrate judge had issued the order for the filing of dispositive motions to seek answers to interrogatories in excess of forty by way of a motion to compel rather than by way of a motion to extend the deadline. Although he indicates that he did not know the provision of the local rule which limited him to forty interrogatories, he was told of the existence of the rule in the defendants' response. No reply has been filed and, therefore, no good reason has been set forth which would justify requiring the defendants to answer all interrogatories in excess of forty. Moreover, there is no indication that he needs the answers to these interrogatories to defend against the motion for summary judgment.

With respect to those requests in the

first forty requests which were objected to, numbers 13 to 15 seek information for staffing and other information relating to March 21, 1989, not the day of the assault at issue in this case which was March 22, 1989. He makes no argument as to why the information sought has any bearing. Although interrogatories 16 through 18 do refer to the proper day, they inquire as to the meal schedule, whether Evans was scheduled to eat "the first setup for afternoon meals," (plaintiff was assaulted in the morning), what job did Evans have and what was his work schedule. Petitioner has not demonstrated how this information is relevant to the subject matter of this lawsuit. Interrogatories 19 and 20 which seem to be designed to elicit possible bad acts by Evans, seek inadmissible evidence. See Fed. R. Evid. 404(b). As formulated, they may seek the

same type of privileged information as do interrogatories 35 through 40, which were also objected to.

With respect to all of the discovery matters, plaintiff has not contended that he needs the discovery to defend against the motion for summary judgment, and indeed he has responded to that motion.

Turning now to the motion for summary judgment, summary judgment is appropriate when supporting materials, i.e., affidavits and other documentation, show there are no material issues of fact to be resolved, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. Rule 56 mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on

which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317. Rule 56(e) requires the non-moving party to go beyond the pleadings and by affidavits, or by the depositions, answers to interrogatories, and admissions on file designate specific facts showing that there is a genuine for trial. Id at 324. The opposing party must adduce more than a mere scintilla of evidence in its favor and cannot simply reassert fact free unsupported allegations contained in his pleadings. Anderson v. Liberty Lobby, 477 U.S. 242 (1986). Further, an opposing party cannot defeat summary judgment simply by asserting that a jury might disbelieve an opponent's affidavit. Liberty Lobby, supra, at 256-57.

The allegations in the complaint will first be set forth followed by the

affidavits and other documents submitted by defendants to pierce these allegations to attempt to show that there is no genuine triable issue of fact, and then by materials presented by plaintiff in an attempt to establish that there are triable issues of material fact.

Plaintiff essentially complains that on the evening of March 21, 1989, after he and another inmate, Charles "Country" Evans, were caught with drugs, for which they both received misconduct charges, Evans made threats to Tabron in the presence of defendant Maskulyak and Grace. He alleges that notwithstanding those threats those two defendants did not place Evans in pre-hearing confinement. Plaintiff alleges that the next morning, on March 22, 1989, Evans attacked Tabron with a homemade weapon made in part from a razor and slashed Tabron's face.

Plaintiff alleges that defendant Perkins came upon the attack in progress but did not come to Tabron's assistance. Plaintiff alleges that despite his innocence of any wrongdoing, he was placed in administrative custody in the prison's restricted housing unit (RHU) by Lt. Grace, an action approved by defendants Sobina, Cooper and Price. Finally, plaintiff alleges that defendants Domovich, Fulcomer, Cooper, and Price, who have supervisory authority over the others, ratified the allegedly improper behavior of the subordinates, failed to discipline them and, according to Tabron, refused to allow him to file criminal charges against Evans.

Although plaintiff's complaint does not assert any clear identification of the specific legal claims he is pursuing, except to indicate that he believes both

state and federal law have been violated, it appears that insofar as plaintiff is raising claims relating to the attack by Evans they are grounded on the Eighth Amendment. See e.g., Whitley v. Albers, 475 U.S. 313 (1986); c.f. Hudson v. Palmer, 460 U.S. 517, 526-27 (1984); insofar as he is disputing his placement in administrative RHU after the incident, he is asserting a deprivation of the due process guaranteed him by the Fourteenth Amendment, See, e.g., Hewitt v. Helms, 459 U.S. 460 (1983); and insofar as he is claiming that there was an inadequate conclusion to the investigation, he was deprived of access to the courts.

To pierce these allegations, defendants have submitted affidavits and other documentation which indicate that approximately 6:35 P.M. on the evening of March 21, 1989, Sgt. Maskulyak was walking

down the third tier of D-Block near cell 310 where Tabron was housed when he noticed that Evans was in Tabron's cell, a place Evans was not authorized to be. He saw Evans surreptitiously pass something to Tabron who was also in the cell. That something turned out to be five (5) marijuana cigarettes.

Since Sgt. Maskulyak was unable to determine to whom the drugs belonged, he directed both Evans and Tabron to leave the tier and go to the prison's control center area and reported what had happened to Lt. Grace. He observed both inmates as they made their way to the head of the cellblock. At no time did either make any threat to the other although he did hear each making remarks to the other to the effect that he (the other) should take responsibility for the drugs. At no time did Sgt. Maskulyak observe either

physically threaten or intimidate the other.

Lt. Grace, who had been informed of the incident with Tabron and Evans in D-Block and also that each kept saying to the other that he "should take the case," in other words, the other should say he was solely responsible for the drugs, ordered them to have seats on separate benches in the control center area when they arrived at the head of D-Block. When he did this, it did not appear to him that they were arguing, since the remarks being exchanged were not agitated enough, in his judgment, to be called that. Nevertheless, he gave them that order so that they could be observed to determine if there was any problem. By doing this, he sought to avoid any escalation of the situation and to assess if any other action, such as pre-hearing confinement,

might be needed.

Lt. Grace observed both inmates as they sat in the control center for approximately thirty minutes. As he recounts, initially while both were somewhat angry and upset, it did not appear to him that they were angry and upset at each other as much as with the fact that they were facing misconducts. What he observed in this respect was, based on his experience, a typical reaction; nothing seemed unusual. At no time did he hear either threaten the other, although initially Tabron and Evans kept telling each other to "take the case." Nor, did he observe any threat what was physical in nature.

Sgt. Maskulyak, who came to the control center after searching Tabron's and Evan's cells, similarly observed no threat of any kind exchanged between the

two. Had he observed anything of that nature he would have issued a misconduct to whomever made the threat.

After sitting in the control center as directed by Lt. Grace, both Evans and Tabron settled down to what appeared to Lt. Grace to be each his ordinary demeanor and both he and Sgt. Maskulyak spoke with them. He specifically asked both inmates if there was any problem existing between them; both said there was none. He also asked each inmate if he was afraid of the other for any reason; again, both indicated no problem.

Since there did not appear to be any threat to the safety of either inmate, Lt. Grace permitted them to return to D-Block. At no time did he or Sgt. Maskulyak ever have reason to believe Evans presented a threat to Tabron's safety.

Later that evening both Tabron and

Evans were served with misconducts relating to the drugs previously confiscated from them. They were notified their respective hearings on the charges would be held on the morning of March 23, 1989.

At approximately 10:00 a.m. the next morning, March 22, 1989, as Tabron and another inmate, Donald Leonard, were walking in the lower portion of the main corridor, Evans assaulted Tabron. Leonard immediately intervened on Tabron's as did various prison personnel in the area. Tabron was removed from the area at once and was taken for medical treatment as he had sustained a laceration on each side of his face.

Officer Perkins was not present at any time during this incident nor did she become aware of it until later in the day. As she explains, she was assigned to work

in the inmate dining room that morning and never saw or heard anything which may have gone on in the main corridor. As she had very briefly seen Tabron on her way to the inmate dining room that morning, nothing appeared out of the ordinary; he was just walking past the entrance to the inmate dining room.

Shortly before the incident, Tabron's institutional counselor had seen him and asked how things were with him. While he appeared to be a little bit low in spirits, he said things were okay. When the counselor asked him if there was a problem, Tabron explained how he and Evans had gotten misconducts the night before and how Evans wanted him to take responsibility for it, something he did not want to do.

The counselor asked Tabron if he thought he was in danger from Evans and

whether he wanted to be put in protective custody. Tabron said "no" that he did not think Evans would do anything to harm him.

Following the incident with Evans and in line with usual procedures, Tabron was placed in administrative custody in the RHU. As Superintendent Fulcomer explains, this action is routinely taken in situations such as this one for the security of the institution. Often it is not possible to tell for certain who was the true aggressor in an altercation and an investigation must be conducted to guard against returning an assaulted person to the general population, where he might prey on others. Those involved in an altercation are typically confined in administrative custody pending a determination if charges should be issued to anyone.

When Tabron was placed in custody he

was given written notice of that confinement.

Tabron had a hearing the next day before the PRC, which was composed of defendants Sobina, Price, and Cooper, relating to his placement in administrative custody. He was informed that he would remain there pending investigation. The PRC listed a review of his placement for March 30, 1989, absent alteration of that date by the hearing examiner as the result of the misconduct pending against him.

Tabron was seen later the same day by the hearing examiner for a hearing on the misconduct issued to him on the evening of March 21, 1989. He pled guilty to the charge. The hearing examiner gave him a sanction of "time served" in the RHU which released him from any disciplinary RHU confinement. The hearing examiner noted,

however, that Tabron's administrative confinement on investigative status was to continue. Tabron was eventually released from the RHU on March 30, 1989.

Defendants' documentation indicates that the Pennsylvania State Police were notified of Evans' assault on Tabron and they proceeded to investigate. Defendants' documentation indicates that in such situations, Huntingdon personnel have no authority of any kind with regard to the investigation including whether charges will be brought which is a matter strictly up to the state police. As a matter of practice, the Huntingdon personnel cooperate fully with state police investigations and the state police may interview whomever they wish. There is no reason to believe that the state police were not able to conduct the investigation they wanted in this case.

Plaintiff's response to the above was to file his own declaration.[1] This declaration is nothing more than a rehash of the allegations in the complaint. As stated in Applegate v. Topp Associates, 425 Fed. 2d 92 (2d Cir. 1970) to prevent the exchange of affidavits on a motion for summary judgment from degenerating into mere elaboration of conclusory pleadings, Rule 56(e) requires supporting and

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[1] Declaration is attached to plaintiff's opposing brief, (Doc. No. 59), and apparently consists of four pages containing seventeen paragraphs followed by an Inmate's Request to Staff Member and an Emergency Room Record and then, a document entitled "Affidavit" in which Tabron certifies that the declaration is true and correct to the best of his knowledge, information, and belief. It is here where Tabron has affixed what appears to be his signature to the affidavit. Below Tabron's signature is a jurat which is not completed. However, at the same time that he submitted the brief and attached declaration, he also submitted an "affidavit" page which does have the jurat completed. (Doc. No. 58). He apparently intends this to be part of the declaration attached to his brief.

opposing affidavits to be made on personal knowledge and to set forth such facts as would be admissible in evidence. In connection with his Eighth Amendment claim, plaintiff's declaration in several paragraphs sets forth plaintiff's conclusion that Grace and Maskulyak "heard" Evans making threats. Of course plaintiff does not know whether or not these officials "heard" the threats. Instead, plaintiff should set forth facts showing the proximity of the parties when the threats were made in order to raise an issue of fact as to whether or not the threats were heard. This he has not done. Moreover, he has not shown in line with Wilson v. Seiter, _____ U.S. _____ (1991) that either of these defendants acted in a way which would show deliberate indifference on their part. At most, his allegations and submissions establish

negligence.

In addition to the attack - related Eighth Amendment claims, Tabron is also claiming that certain of the defendants (Grace, Sobina, Cooper, and Price) deprived him of due process when after the incidents they either directed or approved his placement in administrative segregation. However, documentation Tabron supplies does not contradict the facts as recited by defendant; instead he merely argues that he should have been released sooner. He has submitted nothing which would show that any of these defendants were ever aware of any reason to take action regarding his situation.

Though Tabron maintains that defendants Grace, Sobina, Price and Cooper violated his constitutional rights when they respectively took actions which caused him to be placed in the RHU after

the incident with Evans, the record shows there is not merit to that contention. As defendants' documentation reflects, Tabron was in the RHU at all relevant times for administrative not disciplinary reasons, pending investigation of that incident and what role he had in it. Plaintiff's documentation does not refute this. (See Doc. No. 59, att.).

In Hewitt v. Helms, 459 U.S. 460 (1983), the Supreme Court has held only minimal due process is required where a prisoner is placed in this type of segregation, namely, some notice of the reasons for the confinement, and an opportunity for the prisoner to respond. See 459 U.S. at 476-77. Tabron was given both. See Carson Declaration at Exhibit II. Thus, there was no due process violation relating to his RHU placement and therefore he can maintain no claim

against those defendants.

Further, it is clear from what Tabron has submitted that he is attempting to implicate defendants Fulcomer, Domovich, Sobina, Cooper, and Price on the basis of the doctrine of respondeat superior. He has not shown that any of these individuals had any involvement in any of the events or occurrences which are subject to this claim. Indeed, neither his brief nor any of his attachments even mention Domovich except to list him as a party. Though Tabron claims that these defendants "were directly involved" because they allegedly failed to train, supervise, and discipline subordinates, those contentions do not amount to a basis for a liability. See Chinchello v. Fenton, April 5, Fed. 2d, 126 (3d Cir., 1986). He certainly has shown no deliberate indifference on their part.

Wilson, supra.

With respect to Officer Perkins, his claims against Perkins reflect a dispute of fact. Perkins documentation establishes that he was not present at the scene of the incident between Tabron and Evans on March 23, 1989. Tabron declaration indicates she was present and did not come to his aid, stating "I'm not getting in between them." This dispute, however, is not a material one. In Wilson v. Seiter, supra, the court indicated that it is not enough to only demonstrate the occurrence of events or existence of conditions which are sufficiently adverse to constitute cruel and unusual punishment, as that term has been defined, in a decision of law. Rather, it must be shown that the defendants' state of mind amounted to wantonness. This latter, subjective element the court said "does

not have a fixed meaning but must be determined with due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged." Id., citing Whitley v. Albers, 475 U.S. 312, 320 (1986). Where there is an emergency, for example, a defendant must be shown to have acted maliciously and sadistically for the purpose of causing harm. Whitley, 475 U.S. at 320. In less exigent situations, a defendant must be shown at the very least to be deliberately indifferent to the events or conditions. Wilson, supra. The wantonness or conduct depends not on its effect on the prisoner, but on the constraints facing the official. Id.

What was involved here was an emergency - a sudden attack by one inmate on another. Even assuming it's true that Perkins was at the scene and she made the

statement attributed to her, this sparse evidence is inadequate to establish that Perkins acted maliciously and sadistically for the very purpose of causing harm. Indeed, the statement may be read as negligence.

Finally, defendants' unrefuted documentation establishes that none of the defendants had any authority over the state police investigation or whether it would result in criminal charges against Evans.

In summary, defendants' submissions, which have not been adequately controverted by plaintiff, indicate that defendants are entitled to summary judgment.

On the basis of the foregoing,

IT IS RESPECTFULLY RECOMMENDED THAT

(1) Plaintiff's motion to obtain deposition transcripts be denied;

(2) Plaintiff's motion to compel production of documents be denied;

(3) Plaintiff's motion to compel answers to interrogatories be denied; and

(4) Defendants' motion for summary judgment be granted.

RAYMOND J. DURKIN
UNITED STATES MAGISTRATE JUDGE

Dated: September 18, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

HARVEY TABRON, Plaintiff	:	
v.	:	Civil Action No: 89-0633
LIEUTENANT GRACE, et al., Defendants:	:	(Judge Herman)

O R D E R

Plaintiff has filed a complaint pursuant to 42 U.S.C. §1983 and has submitted a request for appointment of counsel. Non-compensated counsel can be appointed by the court in civil rights cases only when exceptional circumstances exist. Cook v. Bounds, 4 Cir. 1975, 518 F.2d 779; U.S. v. Madden, 9 Cir. 1965, 352 F.2d 792. No such circumstances exist in this case. Consequently, the plaintiff's request for the appointment of counsel will be denied.

NOW, THEREFORE, IT IS ORDERED THAT the plaintiff's request for appointment of counsel is denied.

RAYMOND J. DURKIN
UNITED STATES MAGISTRATE

Dated: October 19, 1989

FEB 2 1 1994

No. 93-1243

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

LT. JAMES L. GRACE, *et al.*,

Petitioners,

v.

HARVEY TABRON,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993
No. 93-1243

LT. JAMES L. GRACE, *et al.*,

Petitioners,

v.

HARVEY TABRON,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT

Respondent Harvey Tabron respectfully submits that the petition for a writ of certiorari should be denied. The decision by the Court of Appeals for the Third Circuit correctly recognized the discretion that is vested in a district court to appoint counsel under the Judicial Code, 28 U.S.C. § 1915(d), and is in accord with that of the other courts of appeals that have identified factors relevant to a district court's exercise of that discretion. Accordingly, petitioners have raised no question that merits review by this Court.

STATEMENT OF THE CASE

On March 22, 1989, respondent Tabron, an inmate at a Pennsylvania correctional institution, was brutally attacked by another inmate, Charles Evans, who used a makeshift knife to lacerate Tabron's neck, face, and jaw, requiring 32 sutures. Tabron brought this civil rights action against petitioners, eight officials at the correctional institution, for violations of his constitutional rights because, among other reasons, they failed to protect him from that assault. Tabron presented evidence that two of the petitioners, Lt. James Grace and Sgt. Francis Maskulyak, were present during the evening of March 21 and the morning of March 22, 1989, when Evans repeatedly threatened Tabron with bodily harm, and that, despite those threats, they took no actions to prevent the attack. Tabron also presented evidence that a third petitioner, Officer Mary Perkins, was present during the attack, but deliberately chose not to intercede. Tabron's claims against the other petitioners dealt with their investigation of the assault and administration of discipline. App. 14a-18a.

Tabron brought his action *pro se* in the United States District Court for the Middle District of Pennsylvania, and he was permitted to proceed *in forma pauperis*. *See* 28 U.S.C. § 1915. As one of his first acts in the litigation, Tabron asked the magistrate judge to whom the case was assigned to appoint counsel on his behalf under subsection (d) of that statute because he did not have the legal education or experience necessary to present his case and needed an attorney to assist him with discovery. Petitioners did not oppose Tabron's motion. Nevertheless, the magistrate judge denied it, stating that, "Non-compensated counsel can be appointed by the court in civil rights cases only when exceptional circumstances exist" and "No such circumstances

exist in this case." App. 18a-20a, 115a. Tabron then endeavored to handle the case on his own.

As the Court of Appeals observed (App. 20a), "During discovery, Tabron's lack of resources and his unfamiliarity with discovery rules and tactics put him at a significant disadvantage." Petitioners deposed Tabron, Evans, and some inmate eyewitnesses. Although Tabron attended the depositions, he was unable to afford copies of the transcripts. Because he could not afford to take his own depositions, Tabron sought written discovery, but petitioners returned his interrogatories unanswered because Tabron had not served them within the six-month discovery deadline imposed by the court's local rules. Tabron moved to extend the discovery deadline, but the court did not act on his motion, apparently because he failed to file a supporting brief that was required under another of the court's local rules. App. 20a-21a.

After moving again, Tabron eventually obtained an extension of the discovery deadline, and he immediately served interrogatories and document requests. In all, Tabron served 146 interrogatories, but most of these were in discrete groups addressed separately to each of the eight defendant-petitioners, and the largest group addressed to any one defendant, Grace, consisted of just 22 questions. Tabron did not address his first 43 interrogatories to any specifically identified defendant, however, and he planned instead for those questions to be answered by whatever defendant had sufficient knowledge to do so. Because, under still another local discovery rule, one party may not serve more than 40 interrogatories on each other party without leave of court, petitioners took advantage of this sequence to count the first 40 of Tabron's questions as applying to all eight defendants, and they invoked the local rule to refuse to answer any questions beyond that number, including the questions

specifically addressed to each defendant individually. App. 21a-22a, 87a-89a. Petitioners could not have employed this gambit if Tabron had organized the interrogatories to ask the specifically addressed questions first.

Of those 40 interrogatories to which petitioners did respond, petitioners answered seven, objected to 24, and responded to the remaining nine by stating that they were "still gathering information . . . and will supplement this response." They never supplied supplementary responses to those questions. App. 21a-22a.

In February 1991, the magistrate judge ordered that all dispositive motions be filed within 60 days. Upon receiving that order, Tabron, who had been awaiting supplementation of petitioners' interrogatory responses and provision of documents they had promised in response to his document requests, filed motions to compel discovery. Petitioners responded to the discovery motions and, before the court ruled on those motions, filed their own motion for summary judgment. In affidavits supporting their motion, petitioners denied that Grace and Maskulyak had overheard Evans threaten Tabron and that Perkins had witnessed Evans' attack on Tabron. Without a ruling on his discovery motions, Tabron was unable to respond to the summary judgment motion with the discovery information he had requested. Instead, he filed a response that relied on his own affidavit that disputed petitioners' denials, and he stated that he would provide other information supporting his opposition to summary judgment when his discovery motions were granted. Though Tabron did not possess any deposition transcripts, his response cited to deposition testimony either from memory or by referring to pages of transcripts that he had been permitted to inspect. App. 21a-24a.

On September 18, 1991, the magistrate judge filed a report and recommendation that Tabron's discovery motions be denied and that petitioners' motion for summary judgment be granted. He recommended that each of petitioners' objections to Tabron's interrogatories be sustained because the questions sought information not relevant to the case or violated the 40-interrogatory limit in the court's local rules. On the motion for summary judgment, he credited the petitioners' affidavits and concluded that Tabron's opposing affidavit was insufficient to create a genuine issue of material fact with respect to whether Grace or Maskulyak heard Evans threaten Tabron because Tabron could not possess personal knowledge of what those defendants heard. The magistrate judge acknowledged that there was a dispute regarding whether Perkins had witnessed Evans' attack on Tabron and refused to intercede, but held, as a matter of law, that such a refusal would not be actionable. App. 72a-114a.

On review of the magistrate judge's report and recommendation, the district court concluded that petitioners should have been required to respond to two of Tabron's interrogatories inquiring about violent behavior of Evans, and it ordered those responses. App. 66a-71a. With that one exception, the district court adopted the magistrate judge's report and recommendation in its entirety, and it entered summary judgment in favor of petitioners. App. 64a-65a.

Tabron appealed to the Court of Appeals for the Third Circuit, which appointed the undersigned to act as his counsel. After briefing and argument, the Court of Appeals reversed, holding that the magistrate judge had applied the wrong standard in refusing Tabron's request for appointed counsel. While the magistrate judge had stated that counsel could be appointed "only when exceptional circumstances exist," controlling Third Circuit case law established that a

district court has discretionary authority to appoint counsel and that there is no single "general standard" determining when such an appointment can be made. App. at 33a-34a, *citing Ray v. Robinson*, 640 F.2d 474 (3d Cir. 1981).

Petitioners characterize the court of appeals' decision as creating some brand new "ten-prong standard" for appointment of counsel. Pet. at 8. In fact, however, the court surveyed federal case law -- particularly, *Maclin v. Freake*, 650 F.2d 885 (7th Cir. 1981), and *Hodge v. Police Officers*, 802 F.2d 58 (2d Cir. 1986) -- to ascertain what factors and criteria should guide a district court's exercise of discretion in deciding whether to appoint counsel (App. 39a-52a), and it adopted this non-exhaustive list of factors from those decisions:

- Whether the claim has some merit in fact and law -- an essential prerequisite, since the court should not consider other factors without first determining that the claim has arguable merit. App. 40a-41a.

- The plaintiff's ability to present his or her case in light of his or her education, literacy, prior work experience, prior litigation experience, ability to understand English, and ability to act despite confinement in prison. App. 41a-42a.

- The difficulty or complexity of the legal questions presented. App. 43a.

- The degree to which factual investigation may be required and the ability of the plaintiff to pursue such an investigation in light of any restraints resulting from prison confinement and the complexity of applicable discovery rules. App. 43a-44a.

- The need to resolve credibility issues through presentation of evidence and cross-examination, and the need to present expert testimony. App. 44a-45a.

- The ability of the plaintiff to retain his or her own counsel without appointment by the court, and the availability of counsel for appointment. App. 46a-50a.

The court held that it was necessary to remand the case to the district court for reconsideration of the decision whether to appoint counsel because the magistrate judge had applied the wrong standard in making that decision and had given no other explanation of why he denied counsel, thus preventing review under the proper standard. App. 52a. Accordingly, the court vacated the district court's judgment and remanded for further proceedings. App. 62a-63a.

Petitioners' request for rehearing was denied (App. 1a-2a), and they then asked this Court for a writ of certiorari. Tabron is responding to the petition for certiorari by his counsel appointed in the court of appeals. If the Court grants certiorari, Tabron shall move to proceed further in this Court *in forma pauperis*.

REASONS FOR DENYING THE WRIT

I. THE COURTS OF APPEALS ARE NOT IN CONFLICT REGARDING THE STANDARDS FOR DECIDING WHEN TO APPOINT COUNSEL UNDER SECTION 1915(d).

Petitioners argue that this Court needs to review this case to decide the standards under which counsel may be appointed under Section 1915(d) because this issue arises frequently in the district courts and, according to petitioners, the courts of appeals are in conflict on how the issue should be decided. Petitioners divide the courts of appeals' decisions into four groups. First, there is the decision below by the Third Circuit, which, they say, adopted a brand new "ten-prong standard" that differs from the standards employed by all other courts of appeals. Pet. at 8, 11-14. The second group applies a "'middle ground' approach" of the Seventh Circuit in *Maclin v. Feake, supra,* 650 F.2d 885, and the Second Circuit in *Hodge, supra,* 802 F.2d 56. Pet. at 13-14. Third, there is the case law in the Eight Circuit, which, according to petitioners, "appears to have its own standard that requires appointment if a 'colorable' claim is presented." Pet. at 14, *citing Hahn v. McLey*, 737 F.2d 771 (8th Cir. 1984) (per curiam). Finally, there is what petitioners characterize as a majority rule requiring "exceptional circumstances" as a prerequisite to appointment of counsel. Pet. at 7, 12. According to petitioners, the First, Fourth, Fifth, Sixth, Ninth, and Eleventh Circuits follow this "majority" view. *Id.* (citing cases).

In fact, however, review of the decisions discloses that, while different courts of appeals use different labels to

describe their approach to appointment of counsel, the analysis employed by each court is the same. Therefore, there is no substantive conflict among the courts of appeals on this issue at all.

First, there is no substantial difference between the analytical framework described by the Third Circuit in the decision below and that described by the Seventh and Second Circuits in their *Maclin* and *Hodge* decisions. In fact, the Third Circuit drew heavily on *Maclin* and *Hodge* in identifying the factors that it concluded are relevant to a determination whether to appoint counsel, citing both cases frequently. App. 39a-54a. In *Maclin*, 650 F.2d at 886-89, the Seventh Circuit emphasized that a district court "has broad discretion to appoint counsel" under Section 1915(d) and that "[t]here are few hard and fast rules governing appointment of counsel." The Court listed factors that should be considered in making this decision, including whether the litigant's claim has merit, the indigent is in a position to investigate factual issues, the testimony is in conflict and presents credibility issues, the indigent is competent and capable of presenting his or her case, and the case presents complex legal issues. *Id.* In *Hodge*, 802 F.2d at 61-62, the court repeated these same factors. Thus, although the decision below contains greater detail about some of these factors, it sets forth essentially the same analysis as that in *Maclin* and *Hodge*, and there is no conflict among these decisions.

Second, contrary to petitioners' argument, there is nothing unique about the Eighth Circuit's approach to this issue that places that court in a special category for purposes of dividing the circuits. Petitioners rely on the Eighth Circuit's per curiam statement in *Hahn v. McLey, supra,* 737 F.2d at 774, that a court should appoint counsel upon request

"when an indigent presents a colorable civil claim to a court." The Eighth Circuit subsequently explained, however, that this statement merely "express[ed] in abbreviated fashion" the court's requirement that no further inquiry into the propriety of appointing counsel should be made until a court first determines whether an indigent plaintiff has established a *prima faca* case that, if proven, would entitle him or her to relief. Once the plaintiff makes that showing, the court then should inquire into several other factors relevant to the need for appointment. *In re Lane*, 801 F.2d 1040, 1043-44 (8th Cir. 1986). The additional factors that the Eighth Circuit considers appropriate for this inquiry are the same as those identified in *Maclin* -- factual complexity, ability of the indigent to investigate the facts, the existence of conflicting testimony, the competence and ability of the indigent to present his claim, and the complexity of the legal issues. *Johnson v. Williams*, 788 F.2d 1319, 1322-23 (8th Cir. 1986). Thus, the Eighth Circuit is in full accord with the Third, Seventh, and Second circuits on this issue.

This leaves the remaining category identified by petitioners -- the purported "majority" of federal appellate courts that follows an "exceptional circumstances" test. But a look at the substance of these courts' decisions discloses that here too there is no disagreement. The Fifth Circuit's decisions are illustrative. The per curiam decision by that court that is cited by petitioners (Pet. at 12), *Santana v. Chandler*, 961 F.2d 514, 515 (5th Cir. 1992), does indeed say that appointment of counsel "is appropriate in a case that presents 'exceptional circumstances.'" But other Fifth Circuit case law, not cited by petitioners, explains what that sentence means. As the Fifth Circuit summarized that law in *Ulmer v. Chancellor*, 691 F.2d 209, 212-13 (5th Cir. 1982), a court "has discretion to appoint counsel if doing so would advance the proper administration of justice" and "is not required to

appoint counsel . . . unless the case presents exceptional circumstances." The factors relevant to a consideration of whether such circumstances exist include whether the case is complex, the indigent is capable of adequately presenting the case, the indigent is in a position to investigate the case adequately, the evidence will consist of conflicting testimony requiring skill in presenting evidence and cross-examination, and appointment of counsel would be a service to the indigent, the court, and other parties by sharpening the issues and assisting in a just and speedy determination -- factors taken liberally from *Maclin*. *See id.* Each of the other five circuits identified by petitioners as employing an "exceptional circumstances" test list similar factors to be considered in determining whether the test is met. *See Cookish v. Cunningham*, 787 F.2d 1, 2-3 (1st Cir. 1986); *Whisenant v. Yuam*, 739 F.2d 160, 163 (4th Cir. 1984); *Lavado v. Keohane*, 992 F.2d 601, 606 (6th Cir. 1993); *United States v. 30.64 Acres of Land*, 795 F.2d 796, 800 n.8 (9th Cir. 1986); *Holt v. Ford*, 862 F.2d 850, 853 (11th Cir. 1989).

Thus, the circuits requiring "exceptional circumstances" follow the same analysis as the other federal circuits, but under a different name. The phrase "exceptional circumstances" apparently originated in the Ninth Circuit when that court quoted a statement in a party's brief that "the privilege of proceeding in forma pauperis is a matter within the discretion of the trial court and . . . should be allowed only in exceptional circumstances." *Weller v. Dickson*, 314 F.2d 598, 600 (9th Cir.), *cert. denied*, 375 U.S. 845 (1963). In a later case, that same court repeated the phrase in the context of appointing counsel under Section 1915(d). *United States ex rel. Gardner v. Madden*, 352 F.2d 792, 794 (9th Cir. 1965). But these decisions talked about when a court's discretionary power under Section 1915 "should" be exercised; they did not purport to declare any limit on the

exercise of that discretion. *See Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986). Indeed, the Fifth Circuit's statement in *Ulmer, supra,* 691 F.2d at 212, that a trial court "is not required to appoint counsel" unless exceptional circumstances are present points to the correctness of the suggestion in the opinion below (App. 38a, at n.4) that these courts use the phrase "exceptional circumstances" to describe situations in which the need to appoint counsel is so clear that failure to do so requires reversal as an abuse of discretion. *See Whisenant, supra*, at 163 ("it is an abuse of discretion to decline to appoint counsel if the case of an indigent plaintiff presents exceptional circumstances"). "Exceptional circumstances" is just a label used by these courts to describe the results of their analyses, just as the court below used its own label -- "special circumstances," a phrase borrowed from that court's earlier decision in *Smith-Bey v. Petsock*, 741 F.2d 22, 26 (3d Cir. 1984) -- to describe the framework of its analysis. App. 39a. The labels have no special significance apart from the analyses themselves.

Though not mentioned by petitioners, the remaining two regional courts of appeals are in accord with the approach to Section 1915(d) followed by all of the others. Tenth Circuit precedent recognizes that a district court has broad discretion to appoint counsel under Section 1915(d) and looks to the factors listed in *Maclin* to determine whether such discretion should be exercised. *See Williams v. Meese*, 926 F.2d 994, 996 (10th Cir. 1991). The District of Columbia Circuit similarly recognizes broad discretion, and, although it appears not to have had a recent occasion to consider what factors should guide exercise of that discretion under Section 1915(d), it has delineated similar factors under other statutes calling for appointment of counsel. *See Hudson v. Hardy*, 412 F.2d 1091 (D.C. Cir. 1968); *Poindexter v. FBI*, 737 F.2d

1173 (D.C. Cir. 1984) (factors under Title VII of 1964 Civil Rights Act).*

All of these authorities establish that there is no real conflict among the circuits. Although the courts use different labels to describe their analyses, the analysis in each is substantially the same. Because the circuits are not divided on this issue, this case does not require review by this Court.

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*. The only Federal Circuit decision to address this issue, *Lariscey v. United States*, 861 F.2d 1267 (Fed. Cir. 1988), is unclear. Although the court, citing *Maclin*, recognized that appointment of counsel under Section 1915(d) is discretionary, it appeared to hold that the propriety of such an appointment depends at least in part on the type of constitutional claim that is asserted by an indigent plaintiff. *See* 861 F.2d at 1271 (citing "exceptional circumstances" cases, without explanation). The precedential value of the decision is questionable because the Claims Court, in which counsel initially was sought to be appointed, may not be a "court of the United States" as that phrase is used in Section 1915, so that there would be no authority for appointment in that court under any standard. *See id.; Froudi v. United States*, 23 Cl. Ct. 328 (1991). In these circumstances, *Lariscey* does not establish a split in the circuits, and even petitioners do not cite it for that purpose.

II. THE DECISION BELOW REQUIRING CAREFUL CONSIDERATION OF RELEVANT FACTORS WHEN EXERCISING DISCRETION UNDER SECTION 1915(d) WAS CORRECT AND DOES NOT REQUIRE FURTHER REVIEW.

The magistrate judge refused to appoint counsel in this case on the ground that such counsel "can be appointed . . . only when exceptional circumstances exist" and "[n]o such circumstances exist in this case." App. 115a. Both the court below and the parties understood this decision to mean that the magistrate judge believed he lacked discretionary power to appoint counsel for Tabron. Since Section 1915(d) explicitly says that a court "may request an attorney to represent any such person unable to employ counsel," the court below held that the magistrate judge's restrictive view of his power was incorrect as a matter of law. App. 38a-39a. Since the magistrate judge offered no other reasons for his denial of counsel and no specific discussion of factors justifying his decision, the court of appeals reversed and remanded for reconsideration of the appointment decision. App. 52a. In seeking review by this Court, petitioners appear to contend that this disposition was error and that, instead, a strict restriction should be placed on the discretionary power of district courts to appoint counsel under Section 1915(d).

The approach that petitioners appear to advocate is completely without merit. First, as the court below observed, it is contrary to the clear wording of the statute. As the court stated, "Nothing in [the statute's] clear language suggests that appointment is permissible in some limited set of circumstances." App. 38a.

Second, such an approach is unsound as a matter of policy. The decision below does no more than to identify

factors that are relevant to a district court's determination of whether or not to appoint. Petitioners point to no sound reason to circumscribe the scope of the court's inquiry into whether discretion should be exercised. Surely, an exercise of discretion should require full consideration of all information that is relevant.

Third, the approach advanced by petitioners is without precedent. As discussed above, despite petitioners' characterization of a "majority rule," all of the courts of appeals, including those that describe their approach as one requiring "exceptional circumstances," employ substantially the same analysis as that outlined by the court below. They do not restrict the factors that a district court may consider in deciding whether to exercise its discretion to appoint counsel, and, contrary to the apparent view of petitioners and the magistrate judge below, they do not place substantive limits on the discretionary appointment power.

The facts of this case make it clear that appointment of counsel to represent Tabron in the trial court certainly was within the district court's discretionary power:

-- There should be no question that Tabron has presented a colorable claim involving serious physical injuries that may have resulted from conduct by some or all of the petitioners that infringed his Eighth Amendment rights.

-- As Tabron predicted in his motion for appointment of counsel, his lack of legal education and experience and unfamiliarity with complex discovery rules hindered his ability to conduct essential factual investigation and to present his case. Indeed, the opinion below specifically acknowledged, "During discovery, Tabron's lack of resources and his unfamiliarity with discovery rules and

tactics put him at a significant disadvantage." App. 20a. Tabron could not afford to take depositions or even to pay for transcripts of depositions taken by petitioners. And the complexity of the discovery rules in the trial court stymied his efforts at written discovery -- he needed to extend a discovery deadline of which he had not been aware before he could obtain answers to the discovery requests; he needed to comply with a briefing requirement of which he was not aware before he could move to extend the discovery deadline; he needed to move to compel discovery responses that had been promised by petitioners because supplementation was not forthcoming on its own; and he needed to learn how to comply with the local court's limit on the permissible number of interrogatories to avoid a manipulation of his questions' numbering that permitted the bulk of his interrogatories to remain unanswered.

-- Since his case depended on resolution of clear conflicts in witnesses' testimony, Tabron required assistance by someone skilled in the presentation of evidence and cross-examination.

-- Tabron's case presented at least one troublesome question of law that remains unresolved: whether the alleged refusal of petitioner Perkins to intercede when she witnessed the attack on Tabron -- a claim of nonfeasance, as opposed to misfeasance through use of excessive force -- is governed by the Eighth Amendment's "deliberately indifferent" standard under *Wilson v. Seiter*, 111 S. Ct. 2321 (1991), or the "maliciously and sadistically with the very purpose of causing harm" standard under *Whitley v. Albers*, 475 U.S. 312 (1986).

In light of these and other factors, the district court certainly had <u>discretion</u> to appoint counsel for Tabron.

Indeed, though the court below left the question open, the failure to appoint counsel in these circumstances must have been an abuse of discretion. In these circumstances, reversal and remand by the court below so that the appointment question could be resolved appropriately under the proper standard was correct, and it does not require further review by this Court.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

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Dated: February 24, 1994.